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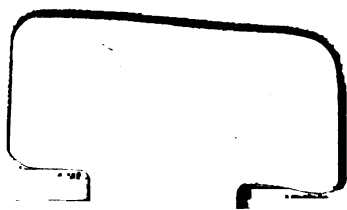
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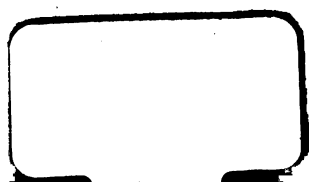
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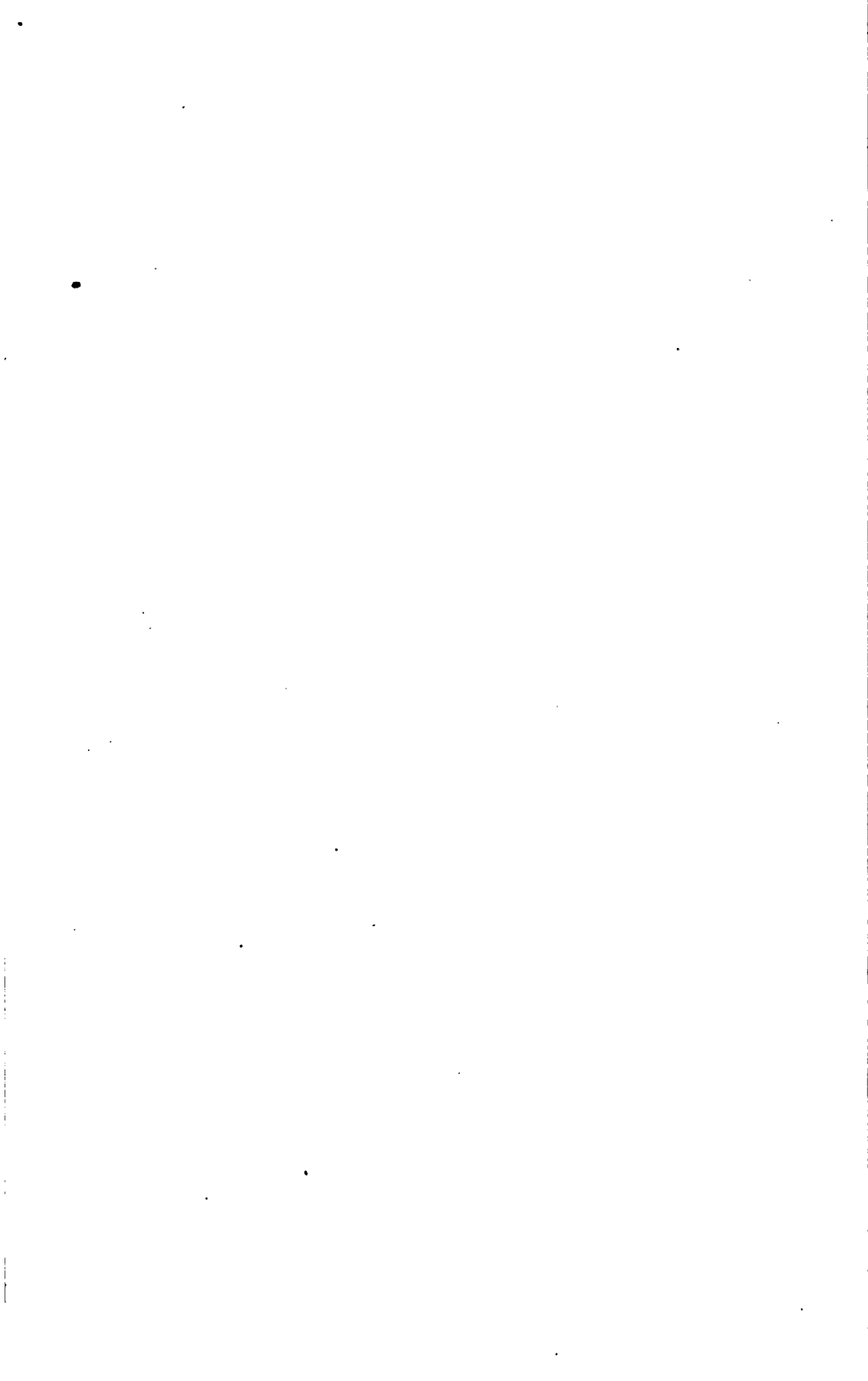
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THE LAW REVIEW.

ART. I.—THE BRIDGEWATER PEERAGE CASE.

“MANY times,” says Bacon¹, “the things deduced to judgment may be *meum* and *tuum*, when the reason and consequence thereof may trench to point of estate. I call matter of state not only the *parts of sovereignty*, but whatsoever introduceth any *great alteration* or *dangerous precedent*, or concerneth manifestly any *great portion of people*.”

If these words had been delivered prophetically, we could hardly venture to doubt that Bacon had in his view precisely that great litigation which during the last two years has occupied the attention of our profession, and we may believe, also, of the public, under the name of the Bridgewater Case. Every word, as well as the whole spirit, of the wise sentence above quoted, is true as a delineation of the nature and circumstances of that case. The immediate question was, indeed, “*meum*” or “*tuum*,” as between the youthful Viscount Alford, and his uncle, the Honourable Charles Henry Egerton (formerly Cust). They alone were the wrestlers and gymnasts in this Olympic; but a whole crowd of public athletes were interested in the issue; for the “reason and consequence” of the struggle trenched to “the parts of sovereignty,” *yea*, even the very composition and purity of our constitution; and a “great portion of the people” were directly and “manifestly concerned,” because the combat of the Viscount was in the name of resistance to what, if his cause was well conceived, was a most “dangerous precedent.”

Seldom, in truth, does it happen that private legal contests

¹ Essay of Judicature.

become the arena for adjusting questions of such distinguished public moment as were contingent upon the issue of this case. It is remarkable, indeed, on account of the vast amount of property in question, the elevated position of the parties at issue, the dignity and authority of the Court before which it was brought, the intellectual and political renown of the individuals of whom that Court was composed, and the powerful advocacy arrayed on either side. Thus, the property is reputed to be worth two millions; the parties were Earls and Viscounts; the Court was the House of Peers, of which the grandeur is well described by Wooddeson, when he terms it "the oracle of jurisprudence" in this country; the individual peers had all attained the highest place their country could bestow in the office of Chancellor, and had called in the assistance of eleven of the Judges of the Common Law as their coadjutors; and these five peers personally are men endowed with minds of such breadth and capacity, but withal of qualities and tendencies and modes of thought so diversified, that their concurrence in opinion upon any public question must so fortify it as almost certainly to render it unimpeachable either in reasoning or sentiment. Their illustrious corps of coadjutors, too, comprised persons of accomplished intellect and profound knowledge. But attractive as all these circumstances and contingents of the discussion were, they fall into insignificance in comparison of the vast consequence to the community at large of the principles and interests concerned in this great forensic trial.

Reducing these questions under general heads, and without more particularly adverting to the various interesting episodes of the discussion (which, however, in their proper place, we shall have to notice), this case compels us at several points to investigate some of the first principles of property, politics, and jurisprudence. The most cursory glance at the argument informs us that the Judges had to consider, *first*, what was the nature and what were the conditions of that right of disposal of landed property which is given by our law, and which, in some form or another, is almost invariably the consequence of the very institution of property itself; *secondly*, what acts of private interference with public pre-

rogative and the constitution of the governing powers are mischievous to the State, and inconsistent with the public interest; and *thirdly*, what discretion or authority belongs to the Judges of the land to prohibit, in the form of a new rule and as a provision for a new case, upon the ground of public policy, and by analogy to the spirit of existing laws, schemes of alienation which a due regard to the public interest and the principles of the constitution would not tolerate.

This is not a fanciful or hyperbolic description of the bearings of the case to which we now invite the attention of our readers; for the questions to which we have here adverted are found to have been, in fact, with more or less of amplitude and distinctness, the topics of argumentation at the Bar, and of deliberation upon the Bench, in each stage of the *Bridgewater Case*. Nor must we omit to remark, that this case is further commended to our attention by the circumstance that there was a *difference of opinion* among the Peers and among the Judges their coadjutors in the final adjudication of it. Numerically, indeed, the judgment ultimately arrived at was that of the *minority*; for nine of the eleven Judges coincided in the opinion which the Lord Chancellor held, in opposition to the four peers who formed a majority of the Appellate Court, exclusively of the Judges.

It cannot but be, therefore, that a case of such a nature, and distinguished by such circumstances as we have pointed out, reflects either credit or discredit upon our jurisprudence, and either adds lustre to, or tarnishes, the reputation of our Courts of Justice. Questions of such moment as we have above depicted, *cannot* have been investigated by a Court of such authority and grandeur as the House of Peers, in a country of such high civilisation as our own, without our admitting that there must in this decision be merit or demerit, good or evil, of serious import to the interests of society generally, according as we English Jurists have proved ourselves equal or unequal to the occasion which has thus arisen. Necessarily, therefore, this case forms an epoch in English law; and, if found to have been worthily treated,

necessarily also it will form an era in the history of general jurisprudence.

Not alone, consequently, to the Lawyer, nor even the Jurist, should this case be instructive, but equally, and, indeed, we think in a pre-eminent degree, to the Statesman and the Philosopher. Seldom is it, in fact, that the history of Law furnishes such a concentration of high public questions, in the form of a technical legal issue, and a trial of the right to private property, in the arena of the forum, as is presented to us in the discussion of the Bridgewater Case. It is, then, a duty, as assuredly it will be an advantage, to inform ourselves of the nature of this discussion, and to elicit all the instruction which it is calculated to afford. To our own countrymen in particular it must be at least a question of interest whether we have vindicated our claim to the respect of other nations, by showing that the administration of justice is with us subservient to the welfare of society, and that, while we respect technical forms as necessary for the general purposes of justice, we do not allow them to obscure the discernment of those public questions and social problems, the solution of which is the highest, and indeed the only true, honour of the forms.

The facts of the case may shortly be stated as follows. It was a suit of "*Egerton v. Lord Brownlow*," instituted in the year 1851, and heard by the present Lord Chancellor, Cranworth, when Vice Chancellor, and decided by his Lordship in the month of August of that year, and brought by way of Appeal to the House of Lords, where it was argued in the presence of the Judges in the month of June, and finally disposed of by the House in the month of August, 1853. The questions arose upon the will of John William, seventh Earl of Bridgewater, who died on 21st of October, 1823, without issue; upon which event the Earldom of Bridgewater devolved upon the Honourable and Reverend Francis Henry Egerton, his brother, who died a bachelor on the 11th of February, 1829; and by that event the Earldom became extinct. Neither of these parties either had or was heir to any Dukedom or Marquisate, nor was there any such Dukedom or Marquisate in existence or in abeyance. The

Earl had an only sister, Lady Amelia Hume, who died before him, leaving two daughters, Amelia Lady Long, and Sophia Lady Brownlow (the wife of John Earl Brownlow), and who were therefore the nieces of the Earl. Lady Long survived the Earl, but Lady Brownlow died before him, and in fact before the date of his will, leaving two children, John Hume Viscount Alford, and Charles Henry Cust (now Charles Henry Egerton). These children, the great nephews of the Earl through his sister, were in immediate succession to their father's Earldom, namely, that of Brownlow, but would never inherit the testator's Earldom, nor any other dignity of the name of Bridgewater. Under these circumstances, John William, the Earl, gave his real estates to Earl Brownlow, Viscount Clive and Sir Charles Long in fee upon trust to settle the same to the uses and subject to the limitations thereafter declared, and in the mean time to permit the estates to be enjoyed by the persons to whom the same would go, if the settlement were actually made; and he directed the settlement to be (after limitations to his own issue, and to his brother and his issue male, and to the Countess his wife, and to Lady Long and her issue male, all of which failed or eventually expired) to the use of Viscount Alford for ninety-nine years if he should so long live, remainder to trustees during the life of the Viscount upon trust to preserve contingent remainders, remainder to the use of the heirs male of the body of the Viscount, remainder to the use of Charles Henry Cust for ninety-nine years if he should so long live, remainder to trustees during his life upon trust to preserve contingent remainders, remainder to the use of the heirs male of the body of Charles Henry Cust, "subject nevertheless as to the several uses and estates so to be limited to the said Viscount Alford and Charles Henry Cust, and to the trustees during their respective lives, and to the heirs male of their respective bodies, to the several *provisoes for the determination thereof* hereinafter contained," with remainder to the use of Wilbraham Egerton, of Tatton, in the county of Chester, Esq., for his life, with remainders over to his sons and their issue male, and others, which it is not necessary more particularly to detail. There was a

declaration that in the settlement the estates were not to be limited to the first and other *sons* of Viscount Alford, or Charles Henry Cust, in tail male, but to the *heirs* male of their respective bodies, in the words of the will, it being declared to be the testator's intention that the *vesting* of the estates in the heirs male of their respective bodies should be suspended *during the lives* of the Viscount and Mr. Cust respectively. Then followed clauses requiring every person becoming entitled to the beneficial enjoyment, in succession, to take the surname and arms of Egerton, with the usual shifting clauses in the event of their not doing so. The uses directed to be limited to Lady Long and to her heirs male were to cease and be void if she should not have issue male living at the determination of the limitations to the testator's brother and his issue male, and the Countess the widow of the testator, and in the same event an annuity previously given to Lady Long was to be increased. Then followed a series of clauses or provisos, to the number of six, which may be described generally as having for their object to unite the testator's estates to a future title of Duke or Marquis of Bridgewater, in the person of Viscount Alford or Charles Henry Cust, and to supersede the use of their father's Earldom of Brownlow, by a superior dignity of the name of Bridgewater. This object the testator endeavoured to accomplish by *penal* sanctions or clauses of *forfeiture*, depriving the family of Viscount Alford of all benefit under the will if he should not acquire the title, and then the family of Mr. Cust, if he should not acquire the title, and thereupon carrying over the estates to the family of Mr. Egerton of Tatton.

The particular scheme and language of these clauses are so material to the consideration of the questions involved, that we shall be excused for inserting them here at length, omitting only formal words : —

“ *Provided* always (1), that if the said John Hume Lord Viscount Alford shall die without having acquired the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, then the use hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void ; and that

if the Earldom of Brownlow shall descend and come to him, and he shall not have acquired, or shall not acquire, the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, before the end of five years next after he shall become Earl Brownlow, then the several uses hereinbefore directed to be limited to the said Viscount Alford, and to trustees during his life for preserving contingent remainders, and to the heirs male of his body, shall thenceforth cease and be absolutely void; and that my said estates hereinbefore devised shall, in either of the said cases, thereupon go over and be enjoyed according to the subsequent limitations directed by this my will, as if the said Viscount Alford were actually dead without issue male: *Provided also* (2), that if the said Viscount Alford shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, with the immediate limitation over of such title and dignity to the said Charles Henry Cust, and the heirs male of his body, or to the heirs male of his body, if he shall be dead leaving issue male, and also, that the said Charles Henry Cust shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him, and the heirs male of his body, then the use hereinbefore directed to be limited to the heirs male of the body of the said Charles Henry Cust shall cease and be absolutely void; And that if the Earldom of Brownlow shall descend and come to him the said Charles Henry Cust, and he shall not have acquired or shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, before the end of five years next after he shall become Earl Brownlow, then the several uses hereinbefore directed to be limited to the said Charles Henry Cust, and to trustees during his life for preserving contingent remainders, and to the heirs male of his body, shall thenceforth cease and be void; and that in either of such cases my said estates shall thereupon go over and be enjoyed according to the subsequent limitations of this my will, as if the said Charles Henry Cust were actually dead without issue male: *Provided also* (3), that if my brother, the said Francis Henry Egerton shall be created Duke or Marquis of Bridgewater, with such limitations over of the said title and dignity as that the same may, immediately after the failure of issue male of my said brother, come to the said Viscount Alford and the heirs male of his body, and after them to the said Charles Henry Cust and the heirs male of his body, then my said estates shall be settled in such manner as if the provisos hereinbefore expressed for the determination of

the uses to the said Viscount Alford and Charles Henry Cust, and to trustees during their lives, and to the heirs male of their bodies respectively; subsequent to the proviso for taking and using the name and arms of Egerton only, had *not* been contained in this my will: *Provided also* (4), that if the said John Earl Brownlow shall, in case of the death and failure of issue male of my said brother in his lifetime, be created Duke or Marquis of Bridgewater, the said title and dignity being limited to him and the heirs male of his body by the said Sophia Lady Brownlow, his late wife, only, and not being inheritable by or limited to any other issue male of the said John Earl Brownlow, the same shall be thenceforth *equivalent* to the acquisition of such title and dignity by the said Viscount Alford, to him and the heirs male of his body, with limitations over to the said Charles Henry Cust and the heirs male of his body; and my said estates shall be settled so as to be enjoyed thenceforth and for the future as if the provisoes hereinbefore expressed for the determination of the uses to the said Viscount Alford, and to the said Charles Henry Cust, and to trustees during their lives, and to the heirs male of their bodies respectively, subsequent to the proviso for taking and using the name and arms of Egerton only, had *not* been contained in this my will, notwithstanding the previous determination, if it shall happen, of the uses to the heirs male of the bodies of the said Viscount Alford and Charles Henry Cust under any of such provisoes: *Provided always* (5), that if the said John Earl Brownlow shall hereafter take *any other title* than Duke or Marquis of Bridgewater, so as to be inheritable by or limited to the issue male of his body by the said Sophia Mary Brownlow, his late wife, or any of them, then the uses to the said Viscount Alford and Charles Henry Cust, and to trustees during their lives, and to the heirs male of their bodies respectively, shall thenceforth cease and be void, and that thereupon my said estates shall go over and be enjoyed according to this my will, as if the said Viscount Alford and Charles Henry Cust were actually dead without issue male: *Provided also* (6), that my said estates *shall not be enjoyed* by the said Viscount Alford or the heirs male of his body, if he shall, by any means whatsoever, succeed to or take *any title* (other than Duke of Bridgewater) to which the title of Marquis of Bridgewater shall not, if then, or would not, if thereafter to be created, be *superior in rank, or have precedence*, being of the same rank; *nor by* the said Charles Henry Cust or the heirs male of his body, if he shall take any title, either by immediate creation, limitation

over or otherwise, other than Duke of Bridgewater, to which the title of Marquis of Bridgewater shall not, if then, or would not, if thereafter to be created, be superior in rank, or take precedence if of the same rank, and that the uses to such of them the said Viscount Alford and Charles Henry Cust, as *shall take any such title contrary to this my will*, and to trustees for his life, and to the heirs male of his body, shall thenceforth cease and be void; and thereupon my said estates shall go over and be enjoyed according to the subsequent uses of this my will, as if he or they taking such other title contrary to this my will were actually dead without issue male."

Then followed clauses for determining any jointure which might be made by the Viscount or Mr. Cust under certain powers given them, if the limitation to him or his heirs male became void under any of the foregoing provisos.

Lord Alford died in January, 1851, without having acquired the title of Duke or Marquis of Bridgewater; but, notwithstanding this breach of the proviso in the will, his eldest son, a youth twelve years old, claimed to be entitled to the estates, as tenant in tail under the devise to his father's heirs male; and he filed a bill against the trustees, and his uncle, the Hon. Charles Henry Cust (now Egerton) and the other parties entitled in remainder, praying that he might be declared equitable tenant in tail in possession of the estates, and that the trustees might account to him for the rents from the death of his father; and by this bill the plaintiff expressly raised the question of the validity and effect of the clauses which affected to make void the gift to Lord Alford's heirs male in the event of his not acquiring the Dukedom or Marquisate. Mr. Egerton, the uncle, met this claim by a simple demurrer.

The claim thus preferred involved a technical question, whether the acquisition of the title was a *condition precedent* to the limitation in favour of the heirs male, or a condition subsequent *defeating* that limitation if the title were *not* acquired; or, in other words, whether the meaning of the will was, that the heirs should take it if the father became Duke or Marquis of Bridgewater, or that the limitation to them should *cease* if he did *not* become such. In using the expression

"condition precedent," and "condition subsequent," we follow the popular (although technically incorrect) phraseology which, for convenience, and as sufficiently expressing the distinction, was used in the argument. The importance of this artificial distinction as to the nature of the contingency consisted in this:—that, if it was a condition *precedent*, the plaintiff's claim necessarily failed, upon the simple ground that the circumstance had not *occurred*, upon which his title depended: if, on the other hand, it was a condition *subsequent*, the plaintiff was unaffected by it supposing the proviso to be contrary to Law; the rule being, that a gift made to cease by an illegal condition is equivalent to an *absolute* or unconditional gift. It would be sufficient, therefore, for the defence of Mr. Egerton and the other remaindermen, if they could maintain the technical contention that the acquisition of the title was a condition *precedent* to the heir's claim, because all question of the legality of the proviso would, in that view, be irrelevant; but it was essential that they should prove the *legality* of the proviso, if it was of the nature of a condition *subsequent*; and undoubtedly, though subsequent, if valid, the plaintiff's claim would be defeated. The Vice Chancellor, Lord Cranworth held that the proviso was of the nature of a condition precedent, on the ground that one of the two alternatives, namely, Lord Alford acquiring, or not acquiring, the title must exist at the death of Lord Alford, and that no estate was to vest in his heirs until *that time*, and therefore the condition was in its nature precedent, though the words ("shall *cease* and be void") were applicable rather to the effect of a condition subsequent than that of a condition precedent. The contingency, said his Lordship, "though described in the will as making void the estate of the heirs male, did not and could not in strictness make it void, but would *prevent its arising*, and so is, to all intents and purposes, a condition precedent."

The Vice Chancellor, though he took this view of the condition, found it necessary, with reference to the pleadings, to advert to the *legality* of the provisos, because under one of them, the estate of the plaintiff would be revived, if Lord Brownlow should be created Duke or Marquis of Bridge-

water, with a limitation of the title to his issue male, by his late wife Lady Sophia; and this, if a valid proviso, gave the plaintiff a contingent interest in having a settlement made according to the will. This contingent interest would, as a matter of form, save the bill from being demurrable; and hence his Lordship was led to examine the validity of the clause providing for the event of Lord Brownlow's acquisition of the title, limited as before mentioned; and this question being nearly, though not quite, the same as that which would have arisen upon the validity of the condition, defeating the interest of Lord Alford's heirs, if it had been held a condition subsequent, the opinion of his Lordship was thus in effect obtained, upon the *legality* of the condition. And his Lordship's view of this part of the case, was that the provisos were valid.

The opinion of the Vice Chancellor, upon the substantial claim of the plaintiff, being altogether adverse to him; and a decree having been in February, 1852, made in accordance with the Vice Chancellor's opinion upon the demurrer, the plaintiff appealed to the House of Lords. Their Lordships in August last reversed the decree, differing from the Vice Chancellor, upon both the technical and the general questions; first holding that it was a condition *subsequent*; and next that it was illegal; and therefore that the plaintiff was equitable tenant in tail in possession of the estates. The learned Judges who attended the arguments, were the Chief Baron Pollock, Parke, Alderson, and Platt, B.B., and Coleridge, Erle, Wightman, Williams, Cresswell, Talfourd, and Crompton, J.J.; but it happened unfortunately that, shortly after the argument, the Judges were under the necessity of attending their Circuits; and it being considered necessary, as it seems, for some reason or another, that judgment should not be deferred, both the House and the Judges incurred the disadvantage of those learned persons preparing their opinions, amid the distractions of Circuit business, without ready access to books; a circumstance to which some of their Lordships took occasion to advert in their observations. This ill-timed hearing of the case also led to an arrangement, which the House considered irregular, that one opinion should be delivered on behalf of those of the Judges who upheld the decree,

and one on behalf of those who supported the appeal. Eventually, with the exception of the Judges who were engaged upon the Northern Circuit, (Wightman and Erle, J.J.,) separate opinions were given; but some of the Judges who furnished opinions were unable to attend in person to deliver them.

Of these eleven Judges, all except Pollock, C.B. and Platt, B., were of the same opinion as the Vice Chancellor, and held, in answer to the questions put to them by the House, that the proviso was to be treated as a condition precedent, and was not void or contrary to Law. The Lord Chancellor adhered to the opinion which he had expressed as Vice Chancellor; but every one who has had an opportunity of becoming acquainted with his Lordship's judicial qualities, must be perfectly satisfied that he did so, not from any prepossession of mind by the mere fact that he had already expressed an opinion, but because, in truth, his Lordship's conclusion had not been shaken by any argument which he had heard. Lords Lyndhurst, Brougham, Truro, and St. Leonards, being the majority of the Peers attending to the case, came, however, to a different conclusion, and the decree was reversed to the effect already stated.

To mention only the names of these noble and learned Lords, is to show that the difficulty which (as need not be concealed) any judgment has to overcome, from which a majority of the Common Law Judges dissent, has in this case been surmounted by the remarkable concurrence in opinion of such gifted men. That must, indeed, be a strong judgment, which has the suffrages of the calm and clear-sighted reason, the sagacity, and the temperate and experienced judgment of Lord Lyndhurst; the quick perception, abundant thought, and potent argument of Lord Brougham; the elaborate and ample reasoning, careful analysis, and intellectual attention of Lord Truro; and the judicial skill, extensive knowledge, and unclouded perception of Lord St. Leonards. It will be obvious, therefore, that, even as a mere specimen of intellectual gladiatorship, the opinions and judgments delivered in this case must be highly attractive to every cultivated mind.

Attempts have been made to disparage this judgment of

the House of Lords, as being given in a case of Peerage by a body naturally disposed to maintain the selectness and elevation of their order, and liable to attach to dignities and questions of title an importance which the community at large will not appreciate. We take, however, a very different view of this case, and we apprehend that it will appear, upon a just consideration of it, that dignities and titles are but matters of its least concern, compared with the other public interests affected by the case; and it is our conviction, that patricians are not more than others concerned to attach importance to it.

It may be insinuated, too, that the House has, in its adjudication of this case, drawn somewhat upon its legislative capacity, and has not, in differing from the Judges, restricted itself to its proper function as a Court declaring, and not making, Law. In this respect also, after the most ample investigation, we believe the judgment to be unimpeachable, and we are satisfied that there has been nothing, but a simple exposition of what, in the view of the Court of Appeal, was actually the Law. We would most readily renounce any and every benefit, which may be conceived to arise from the principles enunciated in this case, were we impressed with even a serious doubt that, in holding the provisoes to be contrary to Law, the House had indulged in an opinion of what the Law ought to be, rather than of what, in truth, it was. The public evil of a Court of Appeal becoming, unconstitutionally, a Court of Legislation, would, in our view, far outweigh any advantages to be gained by the correction (in such a mode) of any mischief in Lord Bridgewater's will.

Upon the technical argument whether the proviso requiring Lord Alford to acquire the dignity was a condition precedent or subsequent, we do not propose to make any lengthened observations. All the Judges having, in answer to the questions put to them, discussed the *validity* of the proviso upon the hypothesis of its being a condition subsequent, and the public interest which attaches to this case arising from the dispute as to the *legality* of the condition and not its form, we shall most suitably occupy the attention of our readers with that part of the case which concerns the vital question

whether the proviso aimed at anything which the policy of the law forbids. We may, however, observe that the fallacy (if, without disrespect, we may use the expression) which appears to us to pervade the arguments of those who contended that the condition was precedent, is, that to construe it a condition subsequent, involved the absurdity of giving and taking away the estate at the same moment of time. Because, it was said, the bounty and the acquisition of the dignity were associated in the mind of the testator, and because the proviso could not otherwise have effect than by *preventing* any estate from *vesting* in the heirs, therefore it was a contradiction in terms to call it a condition subsequent. But limitations to parties may be objects of a condition without any estate being vested in the parties under those limitations. Though the interest depending upon the limitation is altogether contingent, yet it is an interest, and as much an object with reference to which terms of defeazance may be employed, as would be a vested interest under those limitations. A vested remainder is only an ideal interest, as is every right in the land not being the land itself. Surely the coming into existence of the *contingent* remainder, *quà* contingent remainder, did not in this case depend upon the acquisition of the title, and therefore the attempt to make void that contingent remainder was matter subsequent; nor does there appear to be any logical inconsistency in treating as subsequent to the limitation, a condition the alternatives of which, nevertheless, will be determined one way or another before the actual *enjoyment* under the limitation commences, or any interest under it *vests*. When we consider that, by general concession, the *language* of the will denoted an intention to make the limitation *cease* on failure of the condition, and not to *initiate* the limitation upon its being performed, the question is obviously reduced to one of mere logic, in which we cannot but think there has been, on the part of some, a confusion between the right of property under a use or limitation and the use or limitation itself. Upon this branch of the case, however, Lord Truro's judgment will be found a highly finished and perfect piece of reasoning,

and we doubt not it will carry conviction to the minds of our readers, as it certainly has to our own.

Passing on, therefore, to the questions of more general interest, and which Mr. Justice Coleridge described as "new and somewhat difficult subjects," we would observe that the argument was encumbered with some considerations which appear not quite legitimately to have been imported into it. The will was objected to as an exhibition of vexatious caprice; the condition was alleged to be void as impossible; and again as a possibility upon a possibility: but we observe the judgments of the Peers are not founded on any views of this sort, and we apprehend they were strained and far-fetched contentions. It would, perhaps, have been equally well if no conjecture had been hazarded as to the testator or his draughtsman having doubted as to the legality of the proviso, or as to the will being the work of an experienced conveyancer; for it seems hardly consistent with settled rules to advert to any such considerations. It might also have been an advantage if stress had not been laid upon the magnitude of the property in question. The fact that it was of great value served, no doubt, to make the example more striking, of the danger alleged to exist in such schemes; and this probably was the only view with which the circumstance of value was mentioned; but we apprehend there can be no doubt, if the clauses would have been valid as to property of the value of sixpence, they were equally so as to the two millions actually in issue.

The main question to be considered may, we think, be thus stated:—whether, at the time when this case arose, it was contrary to law for the owner of land to give it to another, upon condition that he should forfeit or lose it, if he, or some one related to him, should not, within a certain period, become a Member of the House of Lords, by a particular title or peerage; there not being any such title in existence; and there being no qualification in the clause requiring that the dignity should be obtained as a reward for public services to the State, or that the party should render such services in order to obtain the peerage?

Now, it was conceded on all hands, that no decided case

precisely determining a point of this nature, was to be found in the books; and therefore the question resolved itself into this,—whether there was anything in the provision which made it contrary to the *policy of the law*, and, as such, void by the Common Law?

In discussing this subject, we will, for the present, assume that the right given by our law, of disposing of landed property, is not of such an *absolute* and *unconditional* nature that any and every purpose not expressly forbidden by *statute*, is within the discretion of the owner in exercising that right. We shall, if need be, ascertain how the law actually stands in that respect; but the point obviously does not arise, if the object of the Earl of Bridgewater was not contrary to the policy of the law, or if the Judges were not at liberty to investigate whether it was so.

It must be conceded that, in the investigation of any question of public policy, it is necessary to be careful in our definition of what, in legal arguments, constitutes *public policy*. We do not mean by it public opinion or political expediency, or even the policy of the Government, nor is it what one man or another may conclude to be for the interest or advantage of the public, or may deem it expedient, as matter of public policy, to pursue; but it is that which constitutes the *spirit* of the laws,—that which the “*liberty of the law*” allows; or which, on the other hand, consistently with that liberty cannot be permitted. We are, for this purpose, to ascertain, not alone by the letter, but rather by an enlightened view of the principles, and spirit, and analogy of the laws, what is *mischievous* to the public interest, or tends so directly and obviously to produce mischief to the community, that by the law, as already fashioned and fixed, it must be considered to stand at once reprobated and condemned. We mean, in fact, what the Lord Justice Turner, in almost the very latest¹ case that has occurred of the introduction of a new head of public policy, well expressed to be the rule, when he said²—“In determining questions of this nature, Courts of Justice, as I apprehend, are bound to consider, not

¹ June 28th, 1853.

² 17 Jur. 849.

what, in their judgment, may be most for the interest of the public, but what was *the scope and object of the law which is said to be infringed or attempted to be infringed.*"

Now, is it or not the fact that doctrines of public policy, not founded on legislation, form part of our jurisprudence? or, to put the question in a more precise form, does our law invest the Judges with, or concede to them, the function of determining what is, or is not, contrary to public policy (using that term in the sense already explained)? In other words, were the Judges at liberty to investigate the question, in reference to the Bridgewater case, whether the attempt of the Earl to make the title of his devisees dependent upon their obtaining a marquisate or dukedom, was mischievous to the State, or to the public interest?

To many, indeed, it will appear extraordinary that such a question should be even stated as matter for argument or inquiry. They either think they are familiar by actual experience with the use of such a principle of decision by the Judges, or they have assumed that this must so obviously be a function belonging to Judges, that a judicial character which should disclaim it would be a paradox. But we are not at liberty, in the investigation of the present case, to proceed upon any such assumption; for it will be found, upon a perusal of the opinions of the nine Judges, that some of their lordships, even if they did not openly repudiate the liberty of decision which they were asked to exercise, yet exhibited no partiality for it, and contracted within narrow terms and technical limits the regard to public policy which they considered judicially open to them. Thus, Mr. Justice Crompton said,—“It seems to me extremely dangerous to limit the power of disposition on any general notion of impolicy without some definite rule or principle being shown to apply to the case.” “It must tend to the greatest uncertainty as to individual rights in each particular case, if Courts of Justice are to decide upon nice speculations on what they imagine may be the general effect as to public policy, without some definite mischief to the public being clearly shown to apply to the case.” “The contravention of public policy,” said Mr. Justice Talfourd, “is a term of dangerous because

uncertain, use, in the ascertainment of legal rights." Mr. Justice Cresswell said,—"I presume that your lordships did not intend to ask the opinion of the Judges upon any general motion of public policy, or, in other words, whether they think the interests of the public could be better advanced by tolerating or by refusing to tolerate such provisoes; but whether they are in contravention of any established law, or in contravention of the spirit, although not against the letter, of any law, in which case they may be said to be against the policy of the law." "I presume we are not asked our opinions as to public policy, but as to the law." Mr. Baron Alderson said,—"If by public policy is meant the object and policy of a particular law, then I readily accept it as a rule but here it seems to be contended, that an act possible and legal, but, in the opinion of sensible men, not expedient to be done, is, for that reason, to be void, as contrary to public policy. Now, I think that this, which is really what is here meant, would altogether destroy the sound and true distinction between judicial and legislative functions, and I pray your lordships to pause before you establish such a precedent as that." "It is notorious that this would introduce an ever-shifting principle of decision, and that no case hereafter could be ever determined upon precedents, if it was to be adopted." "It is impossible to foresee where such a principle will stop. I shall not venture to take this therefore for my guide, nor go into political theories or instances from the history of our own country to decide on the validity of the Earl of Bridgewater's will. My duty is, as a Judge, to be governed by fixed rules and former precedents." And Mr. Baron Parke said:—"It is argued that the provisoes are illegal because they are against public policy. This is a vague and unsatisfactory term, and calculated to lead to uncertainty and error when applied to the decision of legal questions." "It is the province of the Judge to expound the law only,—the written from the statutes, the unwritten or Common Law from the decisions of our predecessors and of our existing Courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference,—not to speculate upon what is

the best, in his opinion, for the advantage of the community. Some of these decisions may have, no doubt, been founded upon the prevailing and just opinions of the public good. . . . they have become a part of the recognised law, and we are therefore bound by them; but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we may think otherwise."

The opinions of Judges of such eminence claim the highest deference and respect upon whatever question they may be given; but the circumstance that the House of Lords arrived at a conclusion opposite to that of the learned Judges who delivered the observations above quoted, requires those who wish to understand this important decision, to examine the difficulty which those high dignitaries of the law experienced in acceding to the view of public policy which was contended for on the part of the appellant.

Before entertaining, then, the question whether the provisions of Lord Bridgewater's will were in fact contrary to public policy, let us see how far the Judges were at liberty to ground their decision upon considerations of that nature, in the absence of any express principle or authority showing them to be void.

To determine this question of the extent of judicial discretion, we must consider both the nature of judicial functions in the abstract, and the relation in which our own Judges stand towards our own laws in particular.

Now, every one must concede with Bacon¹, that "Judges ought to remember that their office is *jus dicere* and not *jus dare*; to interpret law, and not to make law, or give law." And, though it is true, *salus populi suprema lex*, we must agree with Selden, when he reminds us that that famous conclusion of the Roman twelve tables is an admonition intended rather for legislators than for Judges. "There is not anything in the world more abused," says Selden², "than this sentence,—*salus populi suprema lex esto*; for we apply it as if we ought to forsake the known law, when it may be

¹ Essay of Judicature."

² Table Talk, "People."

most for the advantage of the people, when it means no such thing; for . . . it is, in all the laws you *make*, have a special eye to the good of the people." We acknowledge, then, that the Courts are not at liberty to proceed on their own views of what is right, unless consistent with the law; and that every encroachment of the Judge upon the boundary which separates legislative from judicial functions, even when justified by an occasional or special necessity, must be regarded as a public evil, inasmuch as it sets a dangerous example of insubordination, and tends to disturb the order of the constitution. In reference especially to the ordinances of the Legislature, the Judges exercise a sound discretion when they refuse to rectify an alleged *impropriety* in a statute upon the basis of the motive which led to its being passed; when they decline to give effect to an *intention* in the statute, which it does not express,—or to speculate upon the *probable* as against the expressed intention,—or to *supply* provisions for cases not included, or to make *exceptions* for a rule which by the statute is clear and unqualified,—or, lastly, to balance theoretical notions of common right and reason against the *power* of the Legislature's decree.

But are the Judges mere expounders of precedents, and critics of pleadings? dispensers of forms and arbiters of costs? Are they to examine only the records upon their rolls and in their year-books? Or are they not rather to take notice that laws, as Demosthenes said, are "the *morals* of a State"—that, as Cicero declared, they should be "explained according to the *public benefit*," and that, "unless they be in order to that end," as Bacon said, "they are but things captious, and oracles not well inspired"? Are they at liberty to forget that there is "left to them, as a principal part of their office, a *wise use and application* of laws"? Is it less true now than of old, that *boni judicis est ampliare jurisdictionem*? Is their function limited by any other than the rule of Justinian, *ne aliter judicet quam legibus aut constitutionibus aut moribus proditum est*?

It is, we apprehend, the attribute of a Judge to conceive, and therefore necessarily it is his duty to give effect to, the *spirit* of the whole *body* of laws which he is appointed to

administer. An indiscriminating adherence to letter and precedent in the law, so far from deserving honour as a scrupulous observance of the line of duty prescribed to Judges, may be highly censurable as endangering the substance for the sake of the form. *Non licet judici de legibus judicare sed secundum ipsas*, while it denies the right to invent law, requires that the *spirit* of what is law, should be discerned. Is it not of the essence of a wholesome system of laws that, in administering them, those relations should be observed which they have “to each other, to their origin, to the intention of the legislator, and to the order of things on which they are established,” including in this the “nature and principle of the government?”¹ Nor is all this less true than the proposition, which equally bears upon our present question, that it is contrary to the very nature of judicial functions that the Judge should treat any case as *unprovided for* by the law. The Judge is entitled to decide that by *analogy* which he does not find to be expressly ruled; and this principle our neighbours in France have carried so far as to provide a punishment for those judges who, upon the ground of the silence or insufficiency of the law, refuse to come to a decision upon a case. *Quod legibus omisum est, non omittitur religione iudicantium.*

We find it objected, however, as a difficulty, in the course of the argument of the Bridgewater case, that the judges have no peculiar aids to determine *what is* publicly injurious, and on that account liable to be held illegal. But, in so far as they have authority to determine what is the spirit of the laws under which we live, they have an advantage which does not belong to any private speculations upon that point, or upon the public good. What, however, is required by these eminent persons for the discharge of this high function but reason and experience?—that *reason* which is, in a greater or less degree, the source and material of all laws and their continuing expansion; not vague, fluctuating or fanciful reason, but that reason which consists with the analogy and spirit and settled reason of the laws: and that *experience*

¹ Montesq. Sp. Laws, lib. i. c. 3.

which Bacon denominates to be the test of all truth, when he says "truth is rightly named the daughter of time, not of authority." And when to this is added what was said by a late Judge¹, that "it is the duty of the Judge in every country to take notice of public matters which affect the Government of the country," the materials surely are ample which the Judges have at hand, in public experience, for coming to conclusions upon questions of legal policy. In this view, we may observe in passing, the peers were doubtless justified when, in the Bridgewater case, they referred, as matter of experience, to the political corruption among ministers and peers, by which particular periods of our national history are disgraced or disfigured, and thence drew inferences as to what public policy required in the case before them. Such, then, being the rightful functions of Judges, we are not surprised to find an old sage expressing his conviction upon this point in the smart saying, "There could be no mischief in the Commonwealth without a Judge."²

If from these considerations of the nature of judicial powers generally, we pass on to reflect upon the institutions of our own law in particular, and the position which the Judges occupy in administering it, our astonishment will certainly not be lessened at the exceptions which, in the Bridgewater case, were taken, by some of our learned Judges, to the rule of public policy as a principle of judicial decision. What is the entire history of our *Common Law* but a constant and gradual *development* of theories and principles, which, until the occasion arose for their manifestation, were to be found only in the "breasts of the Judges?" Can any system of jurisprudence be imagined more completely and essentially one of judicial conception and expansion than our own? Is there any body of laws more elaborately armed with rules of public policy derived from purely judicial authority than our own? Does not the whole course of the Common Law, from the rule in Shelley's case downwards, exhibit one continual struggle of the expounders of our law to exclude mischievous contrivances, and promote wholesome purposes, by rules which

¹ 2 Sim. 221.

² Selden, Tab. Talk, "Judge."

they have declared to be contained in the law, of their own authority, and without the aid of any statute whatever? What is *the rule in Shelley's case* — that apparently most technical and artificial of all rules — but a great conception of public policy, to avoid a continual source of fraud upon tenure, upon creditors, and upon the policy of the law of succession?¹ What was the doctrine of *Taltarum's case* but a bold judicial provision to correct the evil of perpetual entails, and that, too, in spite of the terms of a positive statute?² Who discovered the rule against perpetuities? And by what authority was the boundary of lives in being and twenty-one years defined? Who, again, declared life insurances to be void when the assured loses his life by the hand of law for crime, or by his own hand, in self-murder, though the insurance itself be without such a qualification? Yes, but it is answered, these are established rules and *precedents*, and we, the Judges, have nothing to do but to examine their import, and *follow* them. What is the distinction, then, we rejoin, between the Judges who proclaimed a rule against perpetuities, two centuries ago, when it was wanted, and their successors of the present day, when new devices as hurtful as perpetuities are disporting themselves? Had *they* authority to discover the rule for a *new case*, and security against a novel *danger*, and are we of this hour destitute of such a protection, albeit new public mischiefs and deceits may be daily disclosing their hateful forms to our observation? Surely it must be puerile to argue that the Judge cannot now move without a precedent, when the very precedents themselves were, every one of them, without precedent. If the Judges cannot now act without a precedent, they are equally precluded from relying upon any precedents that exist; for, by the very same reasoning, those precedents are themselves worthless and fragile, being nothing more than false assumption of authority by those who propounded them!

¹ See Hargrave, *Law Tracts*, 564.

² "This sleight was first invented when entails fell out to be so inconvenient, that men made no conscience to cut them off, if they could find law for it." Bacon, tract on "Use of the Law." And see Reeve's "*History of English Law*," vol. ii. p. 164. *et seq.*, and vol. iii. pp. 13. 324. *et seq.*

But let us look a little more closely into the nature of our Common Law, in order to ascertain, as precisely as may be, the relation in which the Judges stand towards it. In one respect our Common Law is like the laws of all other civilised countries, in that it is a "building of many pieces, patched up from time to time, according to occasion, without frame or model," which Bacon¹ declares to be true of the "laws of most kingdoms and states." And inasmuch as our Common Law is essentially *jus moribus constitutum*, it is plain this gradual attraction and accretion of new heads of law must be the work of the Courts; for in relation to such a system the Judges occupy a position essentially different from that which would befit them if acting under a *Code*. We could understand the disclaimer of all considerations of public policy by Judges who had nothing to do but interpret an unyielding, peremptory Code; but it is somewhat remarkable that our Common lawyers, who are not ordinarily supposed to be friends to codification, should be thus ostentatious in their disrelish of that function which peculiarly distinguishes them as expositors of the unwritten law. It is no doubt an elevating spectacle to see men invested with high authority, exercising self-restraint in the use of that authority; but, in the present case, we are not at liberty to forget that the attribute which we here allege to belong to the Judges, attaches to them a grave responsibility and an arduous concern, and that their indisposition to assert their own powers may arise (though unconsciously) from a natural readiness to simplify the nature and limit the accountability of their office. For ourselves, however, we acknowledge that justice seems to be shorn of her noblest privilege if she is not permitted to take a survey of the spirit and gauge the policy of laws—to scale the heights of our Pisgah in order to gain new energy by views of the Jordan of public amelioration and social good.

The relation of the Judges to the Common Law we apprehend to be well described in the following passage by Mr.

¹ Tract on Amending the Laws.

George Long¹:—"The function of a Judge is to apply the law to the facts of the case which is brought before him, and to give to the general rules of law a living reality by virtue of his particular application of them. The direct effect of the judgment is, to decide a particular case, but the decision of a particular case involves the declaration of a rule or rules of law; and if the Judge has rightly understood the rule, and applied it right, his decision is a record of what the law is, or is supposed to be: it is a precedent which may be followed in a like case." In other words, the Common Law is obtained through the operation of a constant process of *development*; and, as we have before said, it lies in the breasts of the Judges until occasion arises for propounding it. The instrument chiefly available for this development of the law is *analogy*, or analogical reasoning. When, therefore, that happens of which Bacon speaks when he says¹,—"the cases of modern experience are fled from those that are adjudged and ruled in former time," the course which the Judges pursue is, to investigate the reason of the case, and the spirit of the whole body of laws pertinent to it, as evidenced by the fundamental principles and maxims of the law, and to ascertain (as Lord Coke used to do) what analogous instances the history and experience of law furnishes. When a decision is evolved from these sources, and by these aids, that decision proves what the law is; but it is not an arbitrary law made for the occasion, or an *ex post facto* provision for circumstances which existed before the rule existed. It is simply a deduction from legal principles,—the recognition of what was implied in those principles,—a determination by just analogy. To allow the existence of a body of unwritten law, and yet to deny to the Judges this function, is a contradiction in the nature of things. For the office of the Common Law is to withdraw each new case from the rude dominion of arbitrary will, and thus to incorporate within itself the results of the experience of each passing age; and its ministers in accomplishing this work are the Judges; and the instruments which

¹ Excursus on "Edicta Magistratum," in his edition of Cic. Ver. Orat. p. 158.

² Tract on Amending the Laws.

they use are those commonly spoken of as the various sources of the Common Law, namely, reason controlled by a due regard to the settled reason of the existing law, general customs, the common opinion of wise men, decided cases or precedents, and analogy.

It is idle to object that this may, only in another form, be in substance a mode of legislation; for we are not here concerned with the question of the expediency of the plan of our legal institutions, but with the simple question of fact as to what they actually are; and, whether expedient or not, it is undeniable that a developing authority in the Judges, is of the very nature and essence of our system of Common Law. It will, however, be understood that we speak only of civil contentions, and not criminal trials; for in regard to the latter, there is an obvious distinction. It would not be right in charges affecting life and liberty, to allow any other rule to the Judge than that of the written law.

When we consider the nature and polity of our government, the theory of judicial discretion which we contend to be incident to our legal institutions, will be found strictly in harmony with it. Ours being a monarchy, is it not true of the English constitution what Montesquieu¹ lays down as to all monarchies, when he says, — “In monarchies, where the laws are explicit, the Judge conforms to them; where they are otherwise, he endeavours to investigate *their spirit*?” Surely, there is something intelligible in the jealousy with which a republican community regard the judicial development of their law, which is unreasonable in a country the distinguishing polity of which is a mutual check and conflict of independent powers, and where the legal functionaries of the State “wield,” to use Hallam’s² words, “the delegated sceptre of judicial sovereignty.”

But, even if it be conceded that the powers of the Judges are anomalous, and liable to abuse, of what consequence is this objection in a country which is so peculiarly fortunate as to have thriven in spite of a host of what abstract speculation regards as anomalies and irregularities in its constitution,

¹ Spirit of Laws, lib. vi. c. 3.

² Middle Ages, vol. ii. p. 264.

law, and government? These functions of the judicial power are in England safely conceded, because as a matter of fact, they have (as a general rule) been in England wisely and beneficially exerted. What more anomalous than the power and constitution of juries, the composition of the House of Peers, and the constitution of that house as a court of justice? and yet what more beneficial or less abused? So, this question of judicial discretion is one of experience, and not of speculation. Among a people of other habits and qualities, and in a constitution not so well balanced and ordered, the power which belongs to our Judges might undoubtedly produce nothing but public mischief, and be the means of causing general disorder and discontent. But so wisely has the judicial power taken counsel with the progress of society, in this country, that, as has been well said by a famous writer on our constitution¹, the Judges' administration of the law has reconciled the country to many defects in the law itself; and moreover "from the earliest times the influence of lawyers has been felt, and felt most beneficially for the country."

In discussing this question of the just limits of judicial authority, we have not found it useful to adduce any example from the Civil Law, for it seems plain that the Romans did not clearly distinguish between the interpretation and the formation of law,—a circumstance which is amply accounted for by Mr. Geo. Long, when he says², — "the Roman Law must not be viewed as modern systems of law may be, which are the results of the experience of past ages."

We have thus far contented ourselves with showing that the theory and nature of our legal institutions necessarily requires that the Judges should exercise the function of proclaiming from time to time new rules of law for new cases, upon the foundation of the spirit, principle, and analogy of the general body of the laws. We should, therefore, conceive it perfectly clear that, even if a question of public policy (not provided for by a technical rule or a statute) had now for the

¹ Lord John Russell, on the English Constitution, pp. 151. 166., 2d Ed.

² Ed. of Cic. Ver. Orat. p. 160.

first time arisen, the Judges would be entitled to apply, and the public would be right in expecting them to apply, such a rule to the case as would best harmonise with the security of the State, and the provisions already made by the law for other similar mischiefs. But with any one well informed of the actual progress and history of our jurisprudence in matters of public policy, speculations upon the power attributed by the theory of the Common Law to the Judges, howsoever conclusive those speculations, in default of better evidence, would be, are utterly insignificant in comparison of the weight and abundance of the testimony which we have at hand, to show that, from the earliest times to the present, the right and duty of expounding law by public policy have not only been proclaimed by the Bench, but have been vigorously put in force and acted upon, in a series of cases not more remarkable for their elevated regard to the public welfare, than for the number and variety of the mischiefs and dangers against which they have been directed. Indeed, so uniform and unhesitating is the tone of authority and duty (for the two it must be remembered are correlative) which the Judges in this respect have throughout our history exhibited, that it is with great and increasing surprise we have read much that fell from the Judges upon the subject of public policy in the *Bridgewater Case*. We might fill this Review with quotations of the most convincing kind from the judgments of almost every great name in our books, asserting again and again that public policy, or the policy of the law, may be and is the proper ground of adjudication, wherever the mischief has not been foreseen by any existing rule, but is such as to be dangerous to the public interest; but we shall content ourselves with stating the doctrine which upon this point was propounded by three of the greatest judges this or any other country ever produced. In the famous case of *Earl of Chesterfield v. Jansen*¹, Lord Hardwicke, speaking of marriage brokerage bonds, says that, in those cases, the Court relieves for the sake of the public, as being a general mischief, and then proceeds to observe,—“political arguments, in the

¹ 1 Atk. p. 301.

fullest sense of the word, as they concern the government of a nation, have always been of great weight in the consideration of this Court; and though there may be no *dolus malus* in contracts as to other persons, yet, if the rest of mankind are concerned, as well as the parties, it may properly be said that it regards the public utility." Lord Mansfield, in the well-known case of *Jones v. Randall*¹, has this remarkable passage: — "It is admitted by the counsel for the defendant that the contract is against no positive law. It is admitted, too, that there is no case to be found which says it is illegal. But it is argued, and rightly, that notwithstanding it is not prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principles; and the law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England which is exclusive of positive law, enacted by statute, depends upon principles; and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or other of them. "The question then is, whether this wager is against principles. If it be contrary to any, it must be contrary either to principles of morality; for the law of England prohibits everything which is *contra bonos mores*; or, it must be against principles of sound policy; for many contracts which are not against morality, are still void as being against the maxims of sound policy."

And lastly, Lord Stowell is reported to have said on one occasion,—“All law is resolvable into general principles. The cases which may arise, and the new combinations of circumstances leading to an extended application of principles, ancient and recognised, by just corollaries, may be infinite; but so long as the continuity of the original and established principle is preserved, pure and unbroken, the practice is not new; nor is it justly chargeable with being an innovation on the ancient law, when in fact the Court does no more than apply old principles to new circumstances.” Any one, we

¹ 1 Cowper, p. 39.

would add, who desires to pursue this subject further, has ample means furnished him of doing so, in the large collection of authorities contained in "The Science of Legal Judgment," published by the late Mr. Ram.

It has, however, occurred to us, that it may be useful and instructive to exhibit a chronological summary of heads of public policy established by judicial authority, excluding those which have emanated from *statutes*, but including those as to which there has been merely a *declaratory* enactment. Such a list accordingly we now subjoin, with the dates of the introduction of each rule so far as we have had opportunity to ascertain them, but which it will be understood may occasionally be proximate only and open to correction. The object which we have had in view in adding this list has been to show that the judicial expansion of public policy of which we have spoken, has been limited to no time—restricted to no exigency—and has acknowledged no bounds save the one question whether the point in issue did or did not involve a mischief, or was contrary to the policy of the law; and we think a more complete refutation there could not be of the argument that even if Lord Bridgewater's condition was dangerous to the public interest, yet the Judges could not prevent the mischief by a qualification of the right which the law gave him to dispose of his own property.

Head or Rule of Public Policy.	Date proximately ascertained of the Introduction of the Rule.
1. Maintenance and champerty - - -	1320
2. Conversion of descent into purchase (rule in Shelley's case) - - -	1366
3. Undue restraint of trade - - -	1414
4. Destructibility of entails (Taltarum's case) -	1472
5. General restraint upon alienation - -	1613
6. Rule against perpetuities - - -	1621
7. Decision by an interested judge - -	1668
8. Gift of money to be applied in procuring a peerage - - -	1681
9. Gift or contract in restraint of marriage -	1690

Head or Rule of Public Policy.	Date proximately ascertained of the Introduction of the Rule.
10. Marriage brocage - - - -	1693
11. No copyright in immoral, libellous, or irreligious publications - - - -	1726
12. Limitation of a man's own property, depriving him of it on his becoming bankrupt - -	1733
13. Composition of an indictable offence - -	1734
14. Wager involving scandal against a third party -	1736
15. Bargain in expectancies under will of living person, behind his back - - - -	1749
16. Assignment of the fees and profits of an office, so as to tend to oppression and extortion -	1751
17. Bequest to feme covert on condition that she live apart from her husband - - - -	1758
18. Secret security by a bankrupt to a creditor in order to obtain signature of certificate -	1760
19. Agreements in consideration of future illicit cohabitation - - - -	1764
20. Gift over in case right of alienation not exercised - - - -	1764
21. Secret arrangement to enhance the price at an auction - - - -	1776
22. Wager upon a question which would give rise to discussions prejudicial to public morality -	1778
23. Attempt to recover back money paid upon an illegal contract - - - -	1778
24. Office brocage - - - -	{ Ancient, but uncertain.
25. Wager upon probability of war being declared -	1781
26. Wager before the poll begins on result of an election - - - -	1785
27. Unwarranted assumption of corporate powers	{ Ancient, but uncertain.
28. Dealing between trustee and cestui que trust -	1788
29. Secret security by a compounding debtor with one of his creditors - - - -	1788
30. Wager upon the amount of a branch of public revenue - - - -	1788
31. Secret agreement with a public officer to make him an allowance if he retires, and the other party succeeds him - - - -	1790

Head or Rule of Public Policy.	Date proximately ascertained of the Introduction of the Rule.
32. Lease of property to be used as a brothel -	1793
33. Assignment of pension or half pay involving liability to future public service - -	1795
34. Insurance by seaman of his wages - -	1797
35. Contract with subjects of a foreign state at war with our own - - - -	1800
36. Agreement entered into in consequence of disclosure of facts by public officer in breach of the confidence reposed in him - -	1801
37. Price of selling or printing immoral, &c., book not recoverable - - - -	1802
38. Ex post facto consideration for facilitating a marriage - - - -	1805
39. Payment of gross sum instead of indemnity to parish officer for maintenance of a bastard -	1805
40. Wager by a party that he does not marry within a certain time - - - -	1808
41. Compounding a fiat in bankruptcy with petitioning creditor - - - -	1811
42. Wager upon the issue of a cruel or barbarous game - - - -	1811
43. Wager upon the life of a foreign prince at war with this country - - - -	1812
44. Provision for future separation of husband and wife - - - -	1818
45. Trick by bidder to depress biddings at an auction	1821
46. Contract with revolted colony of a state at peace with our own - - - -	1823
47. Raising loan for foreign state at war with a state in alliance with this country - -	1826
48. Gift to promote inculcation of doctrines inconsistent with sovereignty of the Crown -	1828
49. Insurance of life without excepting death by self-murder or by the hand of law - -	1830
50. Payment of last debts first where there have been successive insolvencies, and assets realised by trading since the last - - -	1830
51. Indemnity against an intended illegality -	1836
52. Corrupt withdrawal of an election petition -	1838

Head or Rule of Public Policy.	Date proximately ascertained of the Introduction of the Rule.
53. Wager on result of a trial - - -	1839
54. Any gift or contract to enable a party to evade a law made for the protection of the public morals - - -	1848
55. Gift by a nun pursuant to her conventual vow {	1848 [not quite settled]
56. Convention between railway company and contractor limiting liability of either in respect of accidents to the public - - -	1853
57. Alienation by railway company of its tolls -	1853

Does not the foregoing enumeration confirm Bacon's remark, that "just laws and true policy have no antipathy, for they are like the spirits and sinews, that one moves with the other"?

Yes; but it will be said, the owner of property in England has, by law, an unlimited power of disposition of it, and the Judges cannot take away from him that right upon any notion that the public good requires it to be qualified. This is an objection which we are not at liberty to disregard, because it was much relied on by the learned Baron Parke and others. Is it, then, indeed true that our law gives to the proprietor an unfettered power of alienating his land, and leaves him free to consult his own discretion in the mode and conditions of his alienation? How, we would ask, can this be said to be the doctrine of our law, in the face of the restrictions which appear in the above summary? It is, we apprehend, perfectly clear that the rights of property are, no less than the terms of contracts, by our law controlled and subordinated by a paramount regard to the public interest. It is true the law invests the owner with full discretion either to die intestate or to make a will, and that it leaves him free either to provide for his wife and children, or to give his land to strangers, or even to devote it to the posthumous gratification of his vanity and caprice. But the State, though it has judged it best not to interfere to protect individuals, has certainly reserved its right to protect itself;

and this, not merely by legislation, but also by the latent principles of the Common Law. If even there were no other limitation of the landowner's right than the well-known rule against Perpetuities, the proposition would surely be at once established; for let any one trace the history and progressive development of the doctrine of Perpetuities,—the authority by which that doctrine was propounded and fashioned,—and the vast public evils which would flow from waiving the protection of this Rule,—and he will be struck with admiration of this wholesome provision for that public interest which the Courts of Justice have here declared to be paramount to the owner's right of free disposition. The doctrine of the great Lord Nottingham, in the Duke of Norfolk's case, ought to be memorable to Judges in all succeeding time, whenever an enlarged view of the common interest is found to require a principle higher than the precedents that exist.

But is there anything singular or inequitable in this preponderance of regard to the public over the individual interest, in our law? Or is it, on the other hand, harmonious in this respect with general jurisprudence and justice? Upon this point we find the most entire agreement among all writers on natural law. “*In civitatibus contingere solet ut dominium non semper penes quosvis sit illibatum, sed certis limitibus circumscriptum per imperium civile.*”¹ And again, “*Ultimæ voluntates ita temperandæ erunt, prout necessitudinum ratio, et utilitas civitatum requirit.*” The community at large have a general property, or *dominium eminens*, paramount to the interests of the individual proprietor. That right which he has in the land is derived to him from the community, and his enjoyment of it is the effect of the laws of that community. Consistently with this relation of the proprietor to the State, it can hardly ever happen that his right of property is an *absolute* one, because there must inevitably be some regulations to which, for the safety of the public, he ought to conform, in his enjoyment and disposition of the land. “The community at large,” says Rutherfurth, “as

¹ Puff. de Off. Hom. et Civ. lib. i. ch. xii. s. 3. 12.

having a general property in the land of its territory, takes the advantage which such general property gives it, of excluding all from the claim of inheritance unless they are willing to derive this claim from the laws of the community, and to enjoy the benefit of it as an effect of those laws."¹ *Necessitas publica major est quam privata.* Or, as Puffendorf tells us, "The public extremities of the commonwealth must always be supposed to be unanswerable exceptions to all sorts of privileges."² And again, "It is a contradiction to pretend to be a subject, and yet to insist upon a right utterly inconsistent with the common safety." In singular consistency with these rules of general philosophy, is the actual history of the right of property in our own country. Among our Saxon forefathers, the *bôcland*, or private ownership, was derived out of the *folcland*, or property of the State. "The folcland, or land of the community," says the late Mr. Allen, in his "Inquiry into the Royal Prerogative," "like the fisc of the continental nations, was the fund out of which the bôclands, alodial possessions, or estates of inheritance, were carved." "Every charter creating bôcland is a proof that the land had formerly been folcland." "Folcland, being the property of the community, could not be converted into bôcland except by an act of government . . . and when the King came to be considered as the representative of the State, all charters of bôcland ran in his name, and appeared to emanate from his bounty."³

There is yet one other point to be adverted to, in illustration of this interest of the State in the lands of private owners. We mean that the provisions of the law as to landed property have a close and almost necessary connection with the constitution and the government of the country. The principles of succession to land, and its disposition, are vitally important to the stability of the other institutions of the State. Thus, primogeniture in descent, entails, and freedom of alienation, are agreeable to the principles and forms of a mixed monarchical government. They are an

¹ Institutes, book i. cap. 7.

² Law of Nat. and Nations, lib. 8. c. 5. s. 7.

³ P. 125. *et seq.*

emblem of monarchy in every locality, and so tend manifestly to support the throne: they form an independent and wealthy gentry throughout the country, and thus form a barrier to the people against the encroachments of the government; and we may appeal to the history of our own and all other civilised countries as daily furnishing corroborations of this great political law. If this be so, how important an ingredient is this *dominium eminens* in considering the validity of such schemes of disposition as that of the Earl of Bridgewater! for this doctrine of public safety entitles and compels us to ask, whether the contrivance of the Earl for uniting his estates to a nonexisting peerage is compatible with the theory of our Constitution, by the laws of which alone the Earl obtained the power of disposing of those estates, and to which, as we have seen, he is accountable in his exercise of that power. "In the inheritance of property, civil laws have, commonly, principles in view which are relative to the civil polity or constitution of the State itself, and the purposes which such a Constitution has in view."¹

It has occurred to us that powerful use might have been made, in the argument of this case (as against the difficulty which the Judges felt in forming an opinion upon public policy), of that class of cases in which the Courts of Common Law exercise a control over all local and special *customs*, and over the *bye-laws* of corporations and other minor jurisdictions. All these our law holds to be subject to the paramount test of *reasonableness*; and, in judging of this reasonableness, we almost invariably find considerations of public benefit, and of what is required for the general good, to have a prevailing influence with the Courts; and thus no usage, however ancient, and no regulation, however well-intended, is upheld by the Courts, unless it can encounter this wholesome test. Of late years there have been some striking examples of this class of cases; but we must content ourselves with indicating merely the names of them, leaving our readers to judge for themselves of their relevance to the present question. We refer to the cases of *Clayton v.*

¹ Rutherfurth, Inst. book i. c. 7.

Corby, 5 Q. B. 415., *Hilton v. Earl Granville*, 5 Q. B. 701., *Elwood v. Bullock*, 6 Q. B. 383., and *Rogers v. Brenton*, 10 Q. B. 26.

We have now found, as well from a consideration of the inherent nature and conditions of all law, as from observation of the course of our own in particular, that though the right of disposition be in terms unrestricted, yet it is impliedly limited to such purposes and objects as are consistent with the interest and welfare of the community ; and that therefore, in the *Bridgewater Case*, the Judges were at liberty to inquire whether the provisions of the Earl's will were contrary to "public policy ;" that being the designation by which, in this country, we understand the interest of the community or the State.

In discussing the question which now remains,—whether, in truth, the provisions of the *Bridgewater Will* were contrary to the policy of the law, we must bear in mind that the constitution and government are part of the law of the land, and that the Judges, in administering the law, are charged also with executing and giving effect to the provisions of the Constitution. By far the greater portion, and some of the most notable, of our political institutions, rest upon the sanction of the Common Law, and are not expressly decreed or guaranteed by any statute or legislation. In this remarkable circumstance we have only one of the many instances of what, in our institutions, is paradoxical to theorizers on government, who cannot comprehend that any system of public power can be efficient or trustworthy which is not categorically set forth in pompous chapter and verse. Our constitution is not, like those of America and France, paramount to the law, but it takes its place among the other provisions of the law, and claims the consideration of the Courts as itself dependent upon the due administration of justice, in like manner as are the most trifling and inconsiderable of the interests provided for by the law. But hence it follows that the spirit and operation, and incidental tendency to harmony or conflict, of the various powers of the State, are matters of which the Courts of Justice must, in the execution of their office, take notice. And when it is in issue, whether a given

scheme of alienation is contrary to the policy of the law, not the law of landed property and estates merely is to be considered, but the whole firmament of the laws by which the body of the State is compacted, and in which every individual interest must be modified by the conditions required for the security of the rest of the fabrica.

This being premised, let us shortly refer to the grounds taken by the House, in arriving at the decision that Lord Bridgewater's proviso was void.

Lord Lyndhurst, after pointing out that the duties incident to the peerage are of the gravest and highest character, and that in the proper discharge of them the interests of the Crown and the public are deeply concerned, and that any application of property which had a tendency to interfere with the proper and faithful discharge of these duties must be at variance with the public good, grounded his objection to the condition, upon the simple proposition that it tended to *fetter that free agency* in public matters which it is the duty of a Peer, as far as possible, to keep unimpaired. "The question is," said his Lordship, "whether a proviso such as we are considering would have, if acted upon, a tendency to influence improperly the performance of those duties to which I have referred. I think it would have such an influence; and I consider it, therefore, to be against the public good, and consequently illegal and void."

Lord Brougham laid down that from the word "acquire," used in the main proviso, the testator showed he plainly meant the obtaining of the dignity by Lord Alford's own exertions, but that no one could seriously believe the testator contemplated his rise in the peerage should be obtained only by public services, or an exemplary life. His Lordship laid out of view the argument on the tendency of the condition to interfere with the free exercise of the prerogative, and relied on its manifest tendency to "cause corrupt proceedings—to encourage attempts upon the virtue of one class of public servants,—to lay snares for the integrity of another class." His Lordship then showed that it was an undeniable principle of the Constitution, that the Sovereign can only act by advisers, who were liable to err through undue influence,

and to be swayed by improper motives; and that the proviso gave Lord Alford the strongest inducement to use the means placed at his disposal by the will, in obtaining the dignity. Lord Brougham then referred to former times in our history, when the coarse form of naked bribery would probably have been resorted to; mentioning that in the days possibly of the first George—certainly of the second Charles—this would have been considered possible, and that a change in the degree of *probability*, that the proviso might lead to corruption, did not make it lawful. “The *tendency*,” said his Lordship, “is alone to be considered, and unless the possibility is so remote as to justify us in affirming that there is no tendency at all, the point is conceded.” His Lordship then affirmed that the proviso, even setting aside the possibility of the dignity being obtained by corrupt means, was bad as undermining the parliamentary integrity of the party; the “ruder forms of corruption having assumed the less repulsive features of intrigue.” “When we find,” Lord Brougham added, “such remote probability of abuse as amounts to a bare possibility made the ground of decision—the bare possibility of a Peer being influenced by a five pounds wager to decide a cause on which it was next to impossible he should ever sit in judgment—we may well take into our consideration the possibility of his political conduct, his voice upon questions of public policy, being biassed by the desire of obtaining the dignity which should protect himself or his family from ruin.”

Lord Truro declared, that in considering the inexpediency of restrictions upon the free disposition of property, it could not be denied that such dispositions were subject to restraints whenever they had a tendency prejudicial to the public weal; and his Lordship dissented from the criticism which had been “wasted” in relation to the language in which that principle had been commonly expressed. Several valuable propositions were then laid down, including the following:—“The Law looks not to the probability of public mischief occurring in a particular instance, but to the *general tendency* of the disposition.” Again, “There no doubt will be occasionally difficulty in deciding whether a particular case is liable to the appli-

cation of the principle (of public policy); but there is the same difficulty in regard to the application of many other rules and principles admitted to be established law. The principle itself seems to me to be *necessarily incident* to every state governed by law." Again, "The materials for arriving at a sound conclusion upon the question must be gathered from a consideration of the *political and social state of the country.*" And further, Lord Truro, said,—“I entertain the opinion that individuals ought not to be allowed to dispose of their property in any manner which furnishes a motive to conduct, *in relation to acts of state*, independent of a sense of right and duty. I can conceive ~~no~~ *good motive* to influence such a gift. I do not think that the testator could have contemplated any *legitimate* means by which the object sought could be acquired.” His Lordship then declared his opinion of the invalidity of the condition to be the result of his *experience of the state of the political community* subjected to the operation of the proviso, and said that, when exercising the solemn duty of a judge, he could not reject that *experience*, in order to adopt a sentimental theory of purity. And his Lordship concluded that the restriction which forbade the disposition of property being made dependent upon *matters of state*, was not a restriction which could be deemed improperly to interfere with the disposing power which the law had given.

Lord St. Leonards approved the argument urged at the bar, that the proviso would embarrass the Crown, and said,—“A particular dignity is pointed out, and particular limitations of that dignity are chalked out, and there is this pressure at least put upon the Crown, that *a case of compassion is raised.*” His Lordship then showed that the facts of the case of *Kingston v. Pierrepont*, which occurred one hundred and fifty years ago, proved that *at that period*, such was the corruption of the times, that nobody doubted a peerage might be bought; and then pointed out that the case ought to be decided precisely as if it had taken place at the time of *Kingston v. Pierrepont*. He showed that the devisee had *so deep an interest* in obtaining the title as, in effect, to make the pecuniary means given to him, illegal means of *obtaining* the

title. Next, his Lordship said, "It is an indignity, an *insult, offered to the Crown*, that a man should point out a particular title which he will have, and the particular limitations to be attached to that title, and should prohibit a party from taking any other title which should interfere with his view." Then he showed that the honour *could* not have been meant to be acquired only *by merit*, inasmuch as Lord Brownlow might have died leaving Lord Alford an infant; and yet, in that case, he was allowed only five years to acquire the title of duke or marquis, with particular limitations. "The Crown," Lord St. Leonards further observed, "has the means, by giving him only one more step in the peerage, to *secure to him an estate* of seventy thousand pounds a year. It is a position in which no subject has a right to place the Crown. No subject has a right to play, if I may so say, with the prerogative of the Crown, or to make the prerogative of the Crown the basis of an arrangement as to his own property. Dignities ought to come from merit, and merit alone." His Lordship then adverted to the important example of perpetuities, showing what mischief would have been done if, at starting, a certain rule, not to be departed from, had been laid down; and also to the doctrine that a Judge with the smallest interest in a cause, cannot try it, which, though a principle of law, was founded solely upon public policy. "The Law of England knows where to step in, and to stop any improper or any unwise disposition; and I think this is a case in which the exercise of the *power of disposition* ought to be *restrained*." Lastly, his Lordship pointed out the danger of repetitions of such schemes, and added, "No man is wise enough to know or to say where the mischief will stop, or how far it will go. I ask your lordships to consider if there should be, as there might and probably would be, a *considerable number* of landed proprietors, each attempting to raise a dignity upon his own private estate, embarrassing and entangling the Crown, and embarrassing and perhaps leading to mischief the Crown's advisers; how the Crown would deal with the circumstances, and how the Law would stand with respect to that which would become a public mischief?"

It will be observed from the foregoing summary of the

grounds of the decision, that those assigned by some of their lordships were more elaborate than the reasons of others of them; and, in particular, it will be remarked, that Lord Truro's judgment is distinguished by the precision and breadth of the doctrines by which his Lordship established the invalidity of the provisoes. Indeed, we are inclined to think that the judicial character of that noble and learned lord was never seen to so much advantage as in his judgment upon this important case: the reasoning of it is powerful, and the grounds are carefully selected. If, however, we may, without disrespect, give expression to a feeling which has stolen upon us in our investigation of this decision, we would say that the principles by which the vicious nature of the condition is detected and evinced, were, perhaps, capable of being set forth with more of amplitude and manifold completeness, and in more commensurate proportions than the report exhibits.

For we apprehend that the provisions of Lord Bridgewater's will were contrary to law, not only on account of their tendency to produce a corrupt exercise of prerogative, but also, and chiefly, on the ground of their incompatibility with the free action of the powers of the State, and with the nature of the political forces in our Constitution.

The institution of the Aristocracy was that with which and for which the testator bartered: that aristocracy is a constituent part of the Government: the functions which belong to it, as such, comprise all the highest forms of public power; namely, the legislative and the judicial, and even a portion of the executive: that aristocracy and its members are constituted by the sole power of the Crown, in virtue of its prerogative of title and honour: that prerogative is a constitutional trust: it is a trust most delicate and anomalous in its nature: and the other forces in the Constitution are liable to be disturbed by, and are entitled to resent, any illicit or irregular action of this. Such we conceive to be a fair outline of the contingents of this attempt of Lord Bridgewater to bind his devisee to procure a peerage.

Aristocracy is certainly with us a political power, and not a mere bauble or decoration, nor a mere question of social caste,

or of name and precedence in rank. Defined responsibilities pertain to it, appreciable advantages to the community are expected from it, and at the same time peculiar risks and political distempers are incident to it. Thus, Aristotle said¹, "What influences honours have, and how they may occasion sedition, is evident enough; for those who are themselves un-honoured, while they see others honoured, will be ready for any disturbance; and these things are done unjustly, when any one is either honoured or discarded contrary to their deserts; justly when they are according to them." Bacon tells us², that "nobility attempers sovereignty;" and again, that it "putteth life and spirit into a people, but presseth their fortune;" while one, who was himself a sovereign, Napoleon Bonaparte, said³, "An aristocracy is the true support of the throne, its moderator, its lever, its fulcrum. The state without it is a vessel without a rudder, a balloon in the air." And, once more, Montesquieu proclaims⁴, that "the principle of monarchy is corrupted when the first dignities are marks of the first servitude, and when the great men are deprived of public respect." Thus, we learn, that as matter of general philosophy, and antecedently to any view of the provisions of our own Constitution, the very nature of patrician honours is such as to require a jealous and unfettered regard to the interest of both government and people, in the distribution and bestowment of them.

But if, in any given country, these *optimates* wield, by the order of the Constitution, a portion of the supreme power, of how much more importance is it that the avenues to that power should be protected against the intrigues of selfishness and arrogance! Do we not know that the several forms of government are, each according to its tendencies, liable to peculiar distempers and evils—the *vitia*, or *morbus civitatis*?—that, as we are told by Puffendorf⁵, "*Vitia hominum in Aristocratia sunt, si per ambitum, pravasque artes, via in senatum patet viris improbis aut ineptis, exclusis melioribus; si opti-*

¹ On Government, ch. iii.

² Essay of Nobility.

³ Las Cases, 3. 23.

⁴ Sp. Laws, book viii. ch. vii.

⁵ De Off. Hom. et Civ. lib. ii. cap. 8. s. 7.

mates factionibus distrabuntur ; si plebe tanquam mancipiis abuti, et bona civitatis augendo privato patrimonio intervertere student." It is true, there is more imminent risk of these dangers where the *whole* governing power is vested in the *optimates*, than in a mixed government like our own ; but clearly, so far as the aristocratic is an independent authority in the State, the State will need protection against the diseases incident to aristocracy in government. We infer, then, that in deliberating upon the policy of Lord Bridgewater's attempt to bargain for aristocratic power, the Court was at liberty to regard the natural tendency of that attempt to weaken the security against those mischiefs which are incident to dignities when they form, as the Peerage does with us, a fundamental part of the Constitution.

But let us inquire into the actual position of the Peerage in relation to our Constitution ; and by that means endeavour to see what it was Lord Alford was to become, in order to retain the earl's estates. The peer of the realm is, as such, a member of the Upper House of Parliament, and therefore is permanently invested with a part of the high and sovereign power of legislation. He also exercises judicial power, as well in virtue of his right to sit in the ultimate Court of Appeal, as by his attendance upon the various Committees of the House of Lords, in which inquiries of a judicial nature are very commonly conducted. As a member of this same Assembly, he has a voice in administering the executive power of the Crown, whenever there is a temporary defect of whatever nature in the Executive Government ; and thus, for example, he shares in the appointment of a regent during the minority or mental infirmity of the king, and assists in declaring who is possessor of the throne, in the event of the king's abdication of it. The Parliament to which he belongs exercises a right of resisting, "by those means which lie within its sphere, the appointment of unfit ministers," and is invested with "that grand constitutional resource — parliamentary impeachment ;" which has been said to be the palladium of the English Constitution, and which has ere this condemned a Strafford, a Cromwell, a Clarendon, and an Atterbury. Consider, again, that this Parliament to which

he belongs, is absolutely irresponsible, as being the Supreme Court of the nation; that the Peers have the high privilege of trying and being tried by themselves in all criminal charges against them affecting life; that they may vote by proxy, and enter parliamentary protests against laws they disapprove — “a right which Cato or Phocion would have prized;” and, finally, that they may demand audiences of their sovereign upon public affairs, and enjoy other personal privileges and exemptions. Such, then, being the Peerage, shall any one be allowed peremptorily to make the non-attainment of such a responsible position in the State, a cause of forfeiture to his devisee, who may be utterly unfit for its duties? What right has any testator to supply motives for aspiration to such lofty public functions, consisting only,—beginning and ending altogether,—in the retention or loss of acres and bank notes? How, again, shall a corrupt minister meet with his merited impeachment, if those who ought to be free to impeach him, should the public interest require it, have been saved from ruin by obtaining from the guilty man the very dignity which entails upon them the responsibility they violate? And if the testator’s injunction be given to one who is already a peer, and prescribes to him a *rise* in the peerage, how can we expect that, consistently with his wish to avoid the loss of his estate, and to propitiate the Minister who can enable him to keep it, he will bestow a single-minded regard on the interests of the public, and discharge independently and faithfully the legislative and other political functions which appertain to him as a peer? Is it not plain, beyond contest, that to annex an elevation in the Peerage to the enjoyment of property, is necessarily injurious to, and destructive of, the public interest, in that the nation at large are thereby deprived of all guarantee for the disinterestedness and free agency of the peer, in his political relations? It is of the *essence* of constitutional functions that they should be *free*, and affected by no other conditions than those ordained by the Constitution; and how then can any one be entitled to make acts of State a fulcrum in the destination of his property, to the advantage or disadvantage of individuals according as they exert themselves or not to

obtain, or are successful or not in obtaining, a prescribed political elevation?

The moment of the public considerations to which we have here adverted, is much augmented when we come to consider the nature of that *prerogative* of the Crown from which the Peerage emanates. Whatever may have been its origin, no one, in the present day, can regard it (and certainly our law does not) as other than a *public trust*. It is a trust, as Hallam says¹, "like every other attribute of legitimate power, for the public good: not what no legitimate power can ever be, the instrument of selfishness or caprice. There is something more sacred than the prerogative, or even than the constitution — the public weal, for which all powers are granted, and to which they must all be referred." In accordance with this doctrine, Mackintosh² tells us, "The constitutional purpose for which the prerogative of creating peers exists, is either to reward public service, or to give dignity to important offices, or to add ability and knowledge to a part of the Legislature, or to repair the injuries of time by the addition of new wealth to an aristocracy which may have decayed."

By means of this prerogative the Crown has an *unlimited* power of changing from time to time the composition of the aristocratic section of the Constitution; and it has been well said, that this unlimited prerogative of augmenting the peerage is liable to such *abuses*, at least in theory, as might overthrow our form of government. Constitutionally, however, it is subject to the general control of the people exercised by the instrumentality of the Houses of Parliament. The public are therefore entitled to watch with jealousy whether, in the distribution of peerages, those conditions are observed which are necessary to the just action of this prerogative, and its subservience to the public good. Now, what in the nature of things is the first law necessary to the healthy existence of this prerogative? Is it not that which Montesquieu³ points out, in the words, "The royal authority is a spring that

¹ 2 Middle Ages, p. 202.

² Review of the Causes of the French Revolution. Works, vol. II. p. 217.

³ Spirit of Laws, b. xii. ch. 24.

ought to move with the greatest *freedom and ease*." Surely, then, to attach pecuniary interests to any given exercise of this great power, by way of *penalty* for *not* obtaining its exercise, is utterly inconsistent with the freedom and ease which is thus the first law of its being. Doubtless, there will inevitably and always, in a free country, be pressure upon this prerogative, in consequence of the fluctuations of political parties, and the efforts of factions; but these are the necessary incidents of all intelligent government, and pre-eminently so of a mixed monarchy. But how can the public interest tolerate *that pressure* upon the Crown which consists in suspending penalties and forfeitures, pecuniary aggrandisement or ruin, upon a given mode of exercising, or upon a particular non-exercise of, the prerogative. It must, we apprehend, be idle to deny that, by such private arrangements, the Crown *would* in fact be fettered and entangled in its administration of this high public trust. For, is it not matter of experience in common life, that if a man, having a course of action before him, comes to know that another has beforehand made definite consequences to result from any particular act or proceeding of the former, he at once feels himself morally no longer free. True, in a technical point of view, he may disregard the consequences which the other has thus unwarrantably chosen to attach to his course of action, but he feels that, whatever his own rights may be, he cannot and ought not, if possible, to ignore those consequences. Just so, when the Crown is told on the one side that a family will be ruined if a particular peerage be not given, and told on the other that the expectancies of others will be frustrated if it be. Is not this to raise, as Lord St. Leonards said, at least a case of "compassion?" But what has compassion to do with public prerogative, in the exercise of which the advantage of the nation is the only true question. But, then, it is answered,—Yes, but there is not any real pressure or embarrassment, because the urgency of the one appeal neutralizes the pressure of the other, and thus the product is *liberty* to the Crown, and precisely the same as if there were no stress, compassion, or pressure at all. This might, indeed, be all very well if there were any technical doctrine of es-

toppel in moral duties or political functions; but, as a matter of experience, how can any one deny that, in the case supposed, "might" would be "right," and that the suppliants or the remonstrants would prevail according as they could bring to bear the greatest amount of influence upon the Government?

Our position, then, is, that the function of conferring or abrogating rights of private property indirectly by means of specific exercises of a public prerogative forming part of the Constitution, is *inconsistent with the very nature and attributes* of that prerogative. The admixture of the private function adulterates the operation of the public one, and infuses into it a distinctly illicit and poisonous ingredient. To put it in the lowest point of view, it surely exposes the exercise of the prerogative to public *suspicion*; and is not even suspicion of impurity in the governing power, *hurtful to the Constitution*? Or, to express the doctrine in another way, does not this engrafting of private interests upon public prerogative, diminish *the security* which the community would otherwise have, for an independent regard, on the part of the Crown, to the national welfare, in whatever it might do by virtue of its prerogative? We conceive it, therefore, to be perfectly demonstrable that the equipoise of the Constitution is illegitimately affected and imperilled wherever anything but matter of State is *forced* upon the notice of the Crown, in the exercise of its prerogative of creating peers; and that, upon this ground alone, if there were no other, the provisions of Lord Bridgewater's will were contrary to law.

But there is yet one other consideration which will impress this conclusion still more strongly upon our minds. We have seen how, by schemes of this sort, the just action of the constitutional functions of the *Parliament*, the *Peers*, and the *Crown*, is disturbed; but it is of no less moment to consider how the *people* or the popular forces in the Constitution might be entitled to complain, if such schemes were tolerated. In this country, as has been well said, every one of the community is, or may be, invested with a portion of the power by which the body politic is ruled. Every one, therefore, as matter of actual institution, and not of speculation merely, possesses a definite interest in the wholesome exercise of all

public franchises. Each one of the public learns from his infancy that the Constitution is so wisely ordered, that it at once combines the advantages of monarchy, aristocracy, and democracy, and guards against their several inconveniences. Every one, too, is told to admire the universal eligibility for public station, which is the peculiar glory of this country. Every one, again, knows that this nation prospers, not by the affluence of one predominating interest, but by the free action of a number of particular separate interests; and that, just in proportion as there is this diversity of interests, the State may "injure or be injured in a great number of ways." How then can the mass of the public be expected to look on silently and uncomplainingly at any novel private interference with, or pressure upon, the prerogatives of the Crown? There is an injury to the whole commonwealth — aggravated just in proportion as the country is free and prosperous — whenever individual *force* is applied to divert for private benefit the course of public prerogative. There might be no harm in an oligarchy, possibly, in the wildest attempts of land-owners to erect dignities upon their estates; but there is the utmost danger in a constitution of mutual checks and balanced powers, when wealth and station find an avenue to governing power, apart from public merit or capacity. Not only, moreover, is this so in the nature of things, but it is the actual rule of the Common Law to declare in the most emphatic manner, that unfit exercises of the prerogative are contrary to law. Thus Lord Coke¹ has the following remarkable passage: — "If an office, either of the grant of the King or subject, which concerns the administration, proceeding, or execution of justice, or the King's revenue, or the commonwealth, or the interest, benefit, or safety of the subject, or the like; if these, or any of them, be granted to a man that is unexpert and hath no skill and science to exercise or execute the same, the grant is verily void, and the party disabled by law, and incapable to take the same, *pro commodo regis et populi*; for only men of skill, knowledge, and ability to ex-

¹ Co. Litt. p. 3.

ercise the same, are capable of the same, to serve the King and his people." So Blackstone lays down¹ that the Law has "intrusted with the King the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such as deserve them." We ask, then, does or does not the forfeiture imposed in this case upon Lord Alford's family, as the consequence of not obtaining the required title, endanger the security of the public for the fulfilment of this condition by which the prerogative is limited? To this we answer that the attempt of Lord Bridgewater was, in effect this:—"I, who have the right of disposing of my property only by the laws, which you the State have enacted, require you the State to alter the composition of your governing power and to admit into it those whom, in fulfilment of natural duty, I have provided for, on pain of their forthwith becoming penniless, and a burden to the community." Had the House of Lords not withstood this daring attempt, it would have been time for our countrymen to take warning by Aristotle's admonition²:—"Very often great alterations silently take place in the form of Government from people overlooking small matters."

Let any one ponder upon the points which ought to occur to a minister in considering at any given time the expediency, first, of making any increase at all in the members of the peerage, and, next the fitness of any particular person for a peerage, and he must be struck with amazement at the audacity of a man's will, which posthumously makes a prescribed patent of peerage a title-deed to one and a forfeiture to another; as if the status of his family (which might be either disfigured by crime or useless by incapacity or idleness) might be made paramount to the interests of the nation at large.

Our readers will remember the famous attempt in the reign of George the First, to limit to a given number the Crown's prerogative of creating peers. Were our space adequate, it would not be impertinent to refer to much in that question, and in the discussion which then took place upon the relation

¹ 1 Com. ch. vii.

² On Government, ch. iii.

of the prerogative to the public interest, as furnishing considerations corroborative of the conclusion at which we have arrived upon this question of public policy.

Having now shown, as we trust upon conclusive grounds, the utter *incompatibility* of Lord Bridgewater's proviso, with the nature and duties of the prerogative concerned, and with that *free action* of the powers of the Constitution which is of *the essence* of all its provisions; we need say but little upon the topic of the tendency of the will to produce a *corrupt* exercise by the advisers of the Crown of its prerogative of honour. We do not, however, flinch from adopting the conclusion that the condition would have been bad on this ground alone, if none of the more direct considerations to which we have above adverted, had been found applicable to the case. No doubt, honourable means of obtaining the dignity, might possibly, as well as corrupt ones, have been used with at least an equal prospect of success, as was remarked by Mr. Justice Cresswell; but unless it can be denied that *tendency* in a gift to encourage a recourse to illegal conduct, is sufficient to make it void in law, we do not see that there is any answer to the objection, that the temptation afforded to procure a corrupt exercise of the prerogative was in this case fatal to the clause. Nor do we apprehend that, consistently with the instances found in the summary of decisions on public policy above given, it can be correct to say that illegality exists only where, *if* the party laboured to promote his own interest under the condition, he *could not* do it by *good* means. On the contrary, it was, we think, a most material ingredient in the vice of the condition that the testator set *no limit or bounds to the use* of the means furnished by him, as was remarked by the Lord Chief Baron, in his very convincing observations; and yet he ought to have done so, if he did not mean that *anything besides public merit* should be the course by which the peerage should be reached. Some, however, of the Judges put the case of rival applications during life for the same office or title, and an offer by a friend of one of the applicants to endow him with a sufficient estate if the Crown should grant the favour; but this was shown by the Chief

Baron and Lord St. Leonards to be quite an inapt illustration, inasmuch as, in such a case, no rights of property have been made dependent upon the act of the Crown, by an unalterable gift, and inasmuch also as the owner of an estate may himself do many things which he cannot by his gift or condition compel his successor to do. If it is objected (as, indeed, some of the Judges did object), that the argument of the *tendency* is too vague, inasmuch as "an active imagination may find a bad tendency arising out of every transaction between imperfect mortals," we can only answer, by referring to the long list of mischievous *tendencies*, which our Law rules to have the effect of making gifts and contracts void, and which we have given in the summary in a preceding page. Some of the Judges, however, it seems, considered none of those cases to resemble the present. In answer to this, we would refer to the important case of *Jones v. Garcia del Rio*, T. & R. 297. In that case, the very point of tendency to political inconvenience, we find to have been a ground with Lord Eldon for disallowing a contract with the revolted Spanish colony of Peru, at a time when this country was at peace with Spain, and had not acknowledged the government of Peru. "Practically speaking," said Lord Eldon, "great inconvenience may result from these transactions; for if at any future time the government of this country shall be disposed to say, Peru shall still continue annexed to Spain, *these creditors will immediately come to the Government* and say, Do not accede to the arrangement *unless Spain will pay us* what we have advanced to the colony." This authority seems to us so directly applicable in principle to Lord Bridgewater's case, that we can hardly suppose it not to have been cited in support of the contention of the appellant.

But, once more, upon the question of a tendency to produce corruption in Government being a ground of judicial decision, we would ask, what is the privilege enjoyed by the House of Commons of originating Bills of Supply and money measures, but a prudent provision of the Constitution (for in effect it is such), grounded upon the peculiar risk of corrupt votes or modifications of supply emanating from the House of Lords, in consequence of their closer re-

lation to, and sympathy with, the Crown and its Ministers?¹ And again, if, as matter of experience in our political history, peerages have in past times been bartered and bought, how can we refuse to decide upon the tendency to such corruption in the provisions of Lord Bridgewater's will, merely because in our own day uprightness and honour prevail? for, as Bacon said, "Truth is not to be sought in the good fortune of any *particular juncture of time*, which is uncertain, but in the light of nature and *experience*, which is eternal."

What, then, is the experience furnished by our national history, as to the political prostitution of which the Crown's prerogative of honour is susceptible, in the hands of an unscrupulous Minister? We will let Lord John Russell answer this question, in his "Treatise on the Constitution," where² he speaks as follows:—

"It was in the reign of Charles II. that the plan of influencing the members of the Lower House by gifts and favours of the Crown was first systematically framed. The name of 'Pensioner Parliament,' given to the House of Commons which sate for seventeen years without dissolution, is a sufficient index of the general opinion concerning it. Many of the smaller members sold their vote for a very small gratuity. Offices and favours were granted to the speakers most worth buying; the rest were glad of a sum of money. The trifling sum of 10,000*l.* was allowed by Lord Clifford for the purpose of buying members. This was increased by Lord Danby. By a report of a Committee of Secresy appointed in 1678, it appears that many members received money or favours of one kind or another for their votes.

"There can be no doubt that the practice was continued during the reign of William. Sir John Trevor was convicted, when Speaker, of receiving bribes from the City of London, to procure the passing of the Orphans' Bill. Mr. Hungerford was expelled for the same offence.

"These facts show how unjust it is to charge Walpole with having been the first who governed England by corruption. That he carried corruption to a great extent can hardly be doubted.

¹ Hallam, 2 *Constit. History*, p. 196.; Montesquieu, *Sp. Laws*, lib. ii. ch. 6.

² P. 397. (2nd ed.)

He did it with a coarseness which, by destroying the shame attendant upon it, overthrew the barrier of virtue still subsisting, and extended the vice which thus openly displayed itself. He is said to have affirmed that he did not care who made members of Parliament, so long as he was allowed to deal with them when they were made. Perhaps these stories were unfounded; but they threw discredit on his Government.

“At the time of Lord North’s administration the influence of the Crown was exerted in the most profuse, most shameful, and most degrading manner. The friends and favourites of the Minister were allowed to have a share of the loan which they sold the moment after at a gain of ten per cent. Mr. Fox, in his speeches, more than once accuses Lord North of having devoted 900,000*l.* of a loan to conciliate votes. It is remarkable that Mr. Fox allows at the same time, that it is natural a minister, in making a loan, should favour his own friends, and that it is not to be expected any minister will ever act otherwise. He does not venture to blame Lord North for this practice, but only for the abuse of it. Some members of Parliament actually received at that time a sum of money to induce them to vote. Every office of government was a scene of confusion, waste, and prodigality, admirably adapted for the interests of all who wished to enrich themselves at the expense of honour, patriotism, and conscience.”

After the observations which we have made in explanation of what we conceive to be the true grounds of this decision, as it bears upon the State and Constitution, it will need no argument to convince the reader, that the public policy which forbids such a contrivance as Lord Bridgewater’s, has no necessary application to such non-political examples as those of gifts made to cease upon a person not becoming a dean, or judge, or general officer, or doctor in divinity, or senior wrangler, or not obtaining Holy Orders, or not changing name and arms. The essence of our objection, as we need hardly repeat, is, that which the present Lord Chancellor, when sitting in the Court of Exchequer¹, appears to have allowed to be an illegality; namely, that it is a condition trenching upon the liberty of the law *in a matter of State*.

And if the difficulty be suggested as to *the limits* to which

¹ See judgment in *Cooke v. Turner*, 14 Simons, p. 502.

we could carry this doctrine of public policy in gifts, where a desired peerage is part of the contingency, we can only answer, with Lord Lyndhurst, that "what cases come within the rule must be decided as they successively occur; and that each case must be decided according to its own circumstances;" and, with Lord St. Leonards, that "each case must be decided upon principle, and be subjected to the consideration of the Judges," as in the case of perpetuities.

In conclusion, we thank the House of Lords for this important decision. We thank them for having erected this beacon of justice, to beam its pure and unclouded light amid the shoals, and quicksands, and breakers of technical law. And we congratulate the country on a judgment which will secure increased respect for our administration of justice, and new honour for our jurisprudence, and which reflects fresh lustre upon the character of our high tribunals.

ART. II.—THE SMYTH CASE.

To the unreflecting this case only presents the story of an attempt to obtain possession of an estate, made by a person whose folly being almost as signal as his knavery, rendered success from the first nearly impossible. But some important considerations arise from the course of the proceedings when contemplated with attention.

The first remark that occurs, relates to the beneficial effects of the late change in the Law of Evidence. The case could hardly have succeeded; but it would have been disproved with far greater difficulty, and by a much longer investigation, had it been launched upon the testimony of the respectable persons, who swore to their belief in the handwriting of witnesses, and in the authenticity of documents. The impostor's own evidence at once made an end of his case,—we ought rather to say, ought to have made an end of it, for the second remark we have to make relates to that.

The cross examination left, indeed, no doubt whatever; but the examination in chief was quite sufficient. No one who reads it, no one who heard it, could doubt that the man was lying, and lying without the most ordinary caution to conceal his falsehood, or avoid contradictions. Now, we cannot conceive how all that he said when interrogated by his own Counsel, could have been taken down in writing by his attorney, without convincing that attorney of the kind of person he had to deal with, and the kind of written evidence he was producing. No one who ever saw a brief can doubt, that the Plaintiff's contained the parts of the man's story which were the most free from notorious falsehoods, and that no little amount of these had been rejected when the selection was made, and the brief prepared. But suppose the story which he told in Court was all he told the attorney, he was at least seen and conversed with; and no person of common discernment could have been satisfied of his honesty after having an interview, and hearing his account of himself. Yet, suppose further that his demeanour in private was such as to excite none of the suspicions

which arose in Court at every stage of his examination, the falsehood of his story was clear if in any one of its parts it failed. Now in one part it failed because he could only reconcile it with a parish register which was produced, by saying that the book had been tampered with. This charge against a respectable clergyman was at once repelled: and by whom? By the declaration of the attorney himself that it was groundless. It is possible, no doubt, that this gentleman never had heard his client charge the register with falsification. But then he will have to explain how his attention was directed to the point; at what time he first heard of it; how Smyth out of Court explained the discrepancy; what answer he gave to the remark which must have been made by the attorney that the case was defeated by the document; what sifting was then made of the other documentary evidence, to see that no forgery had been committed. It is possible, and barely possible, that all the communication he had with his client, all the stories heard from him, all the papers shown by him, never excited in his mind any suspicion that the whole case was one mass of perjury and forgery—never made him suspect any one part of it. This is barely possible; but if it be not also true, there is no excuse for the gentleman, because any suspicion must have led to such inquiry as would at once have shown what the case was made of.

Nothing can be more just than the position that neither counsel nor attorney is bound privately to try the cause before undertaking to defend it in Court. But it is equally certain, that no attorney is bound to bring forward a case supported by documents which he suspects of being forged. Once his suspicions are awakened, he is bound to make such inquiry as may satisfy him that he is wrong. As to perjury, the same remark may be made, but with this difference, that more than grave suspicion must exist, and that a case is not to be abandoned, if apparently sound in other parts, because the truth of some of the statements appears to fail; it being unfortunately too often the course of unprincipled parties to support a well-founded case by false testimony.

We have no hesitation in affirming, that more caution is

required than professional men generally use, in beginning and in continuing both suits and defences. One abuse is well known to exist; there are counsel who give, much too lightly, opinions whereby attornies are enabled to persuade their clients that they have a fair chance of succeeding. But in the great majority of instances the fault is in the statement laid before them; and that is the attorney's work. If the judge before whom a case comes that plainly ought never to have been brought, or a defence is made where manifestly there never should have been any resistance to the demand, were to express his sense of the attorney's conduct, which has caused this grievous injury both to the parties and to the public; if he were to mark his opinion of the individual, naming him distinctly in open court, it would be dangerous for that man again to fall under a like censure, and others would be deterred by his example, while he was restrained if not reformed by experience.

The remark is now very current, that as we have been reforming the Law, so should we now reform the lawyers also. The discipline exercised on some Circuits is exceedingly wholesome in this respect; but unfortunately it is confined chiefly to matters of professional etiquette. The Benchers of the Inns of Court have no power without exceeding their proper authority. The Judges ought to exercise a stricter supervision; but few of the professional man's misdeeds come before them. If there were a Minister of Justice, it is certain that he would be able to assist more effectually in purifying all branches of the Profession, provided he were armed with due authority; authority to be exercised in concert with the Judges and the Heads of the Inns.

ART. III.—HISTORY OF JURISPRUDENCE.¹No. VI.—THOMAS HOBBS², 1588—1679.

SAVIGNY has said that a domain of science like Law, cultivated by the unbroken exertions of many ages, is for the present time a rich inheritance. There is not merely the mass of truths accomplished, but the efforts of scientific minds, all the attempts of our predecessors, whether they have been fruitful or failures, are either guides or warnings; and thus we are enabled to labour with the united strength of the ages that are past. Were we, through indifference or presumption, to neglect this natural advantage of our position, and to abandon to chance the influence which it ought to exercise over us, then should we throw away an inestimable advantage; the indissoluble substance of true science, the community of scientific convictions, and the living progress, without which that community would degenerate into a dead letter.³

Thus, although there is more to censure in the writings of Hobbes than we shall find in those of any other philosopher who has written so much and so well, it is impossible to deny the importance of his place in the History of Jurisprudence. Even by the very opposition which his paradoxes excited progress was accelerated. Against Hobbes, Harrington defended liberty, and Clarendon the Church; against him

¹ For Nos. I. and II. see vol. xvi. pp. 59. and 268.; for No. III. see vol. xvii. p. 105.; for Nos. IV. and V. see vol. xviii. pp. 91. and 249. We purpose to continue this series of articles upon the Development of Jurisprudence. A great impulse has recently been given to legal reform in England. It may therefore prove not unacceptable for our readers to peruse an historical review of the great writers who have scientifically cultivated Law, combined with a sketch of its internal development.

² WORKS:—*Elementa Philosophica De Cive*: Paris, 1642, 4to. *Leviathan*: London, 1651, fol. *Human Nature; or the Fundamental Elements of Politics*: London, 1650, 12mo. *De Corpore Politico; or the Elements of Law, Moral and Political*: London, 1639, 12mo. *Moral and Political Works*: London, 1750, fol. *Complete Works, English and Latin*, edited by Sir W. Molesworth; 16 vols. 8vo.: London, 1839—1845.

³ *System des heutigen Römischen Rechts. Vorrede*, i.

Cudworth insisted upon the natural distinction between right and wrong; whilst Cumberland, Shaftesbury, Clarke, Butler, and Hutcheson are all arrayed in philosophical antagonism against the author of the *Leviathan*; all are warned by his errors, and even in opposition benefit by his genius and industry. But though Hobbes be condemned for having in his political system represented man as an untameable beast of prey, and government the strong chain by which man is kept from mischief, his doctrines are not all error; succeeding writers have derived much assistance from his powers of analysis; whilst his idea that man is by nature solitary and selfish, that the social union is entirely an interested league, has been expanded into the doctrine of Utility; and though in some instances pushed too far, has been applied with success to the theory of Punishment by Bentham.

Thomas Hobbes,—one of the greatest intellects of the seventeenth century, and deservedly ranked with those eminent persons, Bacon, Des Cartes, and Grotius, the fathers of modern philosophy—was born at Malmesbury in Wiltshire, on the 5th of April, 1588. At school an indifferent classical scholar, in 1603 he proceeded to Magdalen Hall, Oxford; and, on the recommendation of the Principal of the College, was in 1608 taken into the family of Lord Hardwicke, afterwards Earl of Devonshire, as tutor to his eldest son. With him he made the grand tour; and in foreign society added the study of the *Belles Lettres* to the philosophy of Aristotle. On his return to England with the young Lord Cavendish, he speedily became known to persons of the highest talents and position there. Bacon is said to have employed the rising philosopher in the translation of several of his works from English into Latin. And it may be presumed that this circumstance contributed not a little to encourage that bold spirit of inquiry and that aversion to scholastic learning which characterise his writings; whilst, through obstinacy and excessive opinionativeness, he determined to found a system of his own, disregarded experiment, and despised the labours of his predecessors. Lord Herbert of Cherbury was also one of the friends of Hobbes; and Ben Jonson is said to have revised his first published work, namely, the

Translation of Thucydides. This was undertaken, as he somewhat affectedly tells us, "with an honest view of preventing, if possible, those disturbances in which he was apprehensive his country would be involved, by showing, in the history of the Peloponnessian war, the fatal consequences of intestine troubles."

Hobbes was one of those great men who have been *seri studiorum*. By the age of thirty he had supplied the defects of his early education so as to be able to write Latin with fluency. His first work, the Translation of Thucydides, was not published until he had arrived at the mature period of forty years. It was after this, too, that he learned the first rudiments of geometry. But the influence of his character and conversation was always great.

In France, such was the reputation of Hobbes, that before he had written anything except the Translation of Thucydides, his observations on the Meditations of Des Cartes were published in the works of that philosopher along with those of Gassendi and Arnauld. Yet it was not until towards his sixtieth year that he began to publish those philosophical writings which have excited such endless controversies amongst the learned, and raised questions still undetermined.

Hobbes passed a great portion of his life on the Continent as tutor to the two successive Earls of Devonshire. In 1637, on his return to London, he found England agitated by the political convulsions which were preparing the fall of the Monarchy. His devotion to the family of Devonshire, as well as his natural inclination, made him embrace the cause of the Crown; and the warmth with which he supported it was converted into a violent indignation for democratic opinions, and even for all liberal doctrines. In 1640, he sought an asylum in France which might afford him the advantage of continuing his labours in peace, and publishing them in freedom. There, in 1642, he first printed his treatise *De Cive* for private circulation. In 1647, he published the treatise at Amsterdam, with vindicatory notes; and a French translation was also published at Amsterdam in 1648. In 1650, an English treatise appeared with the Latin title, *De Corpore*

Politico; and in 1651, the entire system of his philosophy was published in the *Leviathan*.

Immediately after the appearance of the treatise *De Cive*, Des Cartes said of it:—"I am of opinion that the author of the book *De Cive* is the same person who wrote the third objection against my *Meditations*. I think him a much greater master of morality than of metaphysics or natural philosophy, though I can by no means approve of his principles or maxims, which are very bad and extremely dangerous, because they suppose all men wicked, or give them occasion to be so. His whole design is to write in favour of Monarchy, which might be done to more advantage, upon maxims more virtuous and solid. He has written likewise greatly to the disadvantage of the Church and the Roman Catholic religion; so that, if he is not particularly supported by some powerful interest, I do not see how he can escape having his book censured."

But others, and of a different character, were not wanting in their censure of the *Leviathan*, and the alleged motives of its publication. Clarendon informs us that Hobbes told him in Paris, when the work was near publication, that he knew it would be displeasing to him. Whereupon, on Clarendon hearing some of the doctrines, and remonstrating with Hobbes, the latter replied, "after a discourse between jest and earnest, 'the truth is, I have a mind to go home.'" And Clarendon's expressed opinion of the *Leviathan* is this:—"The review and conclusion of the *Leviathan* is, in truth, a sly address to Cromwell, that being out of the kingdom, and so being neither conquered nor his subject, he might, by his return, submit to his government, and be bound to obey it. This review and conclusion he made short enough to hope that Cromwell might read it; when he should not only receive the power of his new subject's allegiance by declaring his own obligations and obedience, but by publishing such doctrines as being diligently infused by such a master in the art of government, might secure the people of the kingdom (over whom he had no right to command) to acquiesce and submit to his brutal power."

The theologians at once exclaimed against the *Leviathan*,

that it contained many impieties, and that its author was no longer of the royal party. Hobbes was ordered to appear no more at the court which Charles II. maintained in exile. Many were of opinion with Clarendon that Hobbes had modified many passages so as to ingratiate himself with the party which was triumphant in England. In effect he accomplished a return to England in 1653, and lived in comparative obscurity with his patron, the Earl of Devonshire. He published another resumé of his philosophy in 1655, entitled *Elementa Philosophiæ*. These are divided into three parts, entitled *De Corpore*, *De Homine*, *De Cive*; the last being substantially the same with the treatise similarly named and published separately. Upon the restoration of Charles II., in 1660, he came up to London, where the king graciously received him, and settled 100*l.* per annum on him out of the privy purse. In 1666, he received an alarm in the censure of his works, *De Cive* and the *Leviathan*, by both Houses of Parliament; but the storm blew over, and he lived peaceably for the remainder of his life in the family of Lord Devonshire. The Earl of Devonshire, as Dr. Kennet¹ informs us, for his whole life entertained Mr. Hobbes in his family as his old tutor rather than as his friend or confidant. He let him live under his roof in ease and plenty, and in his own way, without making use of him in any public or so much as domestic affairs. He would often express an abhorrence of some of his principles in policy and religion; and would often say, "he was a humorist, and nobody could account for him." Hobbes' professed rule of health was to dedicate the morning to his exercise, and the afternoon to his studies. At twelve o'clock he had a little dinner provided for him, which he ate by himself, without ceremony. Soon after dinner he retired to his study, and had his candle, with ten or twelve pipes of tobacco laid by him; then shutting his door he fell to smoking, thinking, and writing for several hours. Towards the end of his life he had very few books, and those he read but little, thinking he was now able only to digest what he had formerly fed upon. If company came to visit

¹ *Memoirs of the Cavendish Family.*

him he would be free in discourse till he was pressed or contradicted, and then he had the infirmities of being short and peevish, and referring to his writings for better satisfaction. His friends who had the liberty of introducing strangers to him made these terms with them before their admission, that they should not dispute with the old man, nor contradict him.

In 1674 and 1675 he published his translation of the *Iliad* and *Odyssey*, being then in his eighty-seventh year. The singularity of the undertaking, and the extraordinary versification, render these works objects of the greatest curiosity.

The translation of the *Iliad* commences thus:—

“ O Goddess, sing what woes the discontent
Of Thetis’ son brought to the Greeks; what souls
Of heroes down to Erebus it sent,
Leaving their bodies unto dogs and fowls
Whilst the two princes of the armies strove,
King Agamemnon and Achilles stout:
That so it should be was the will of Jove,
But who was he that made them first fall out.”

Beattie has severely criticised these translations. In his *Iliad* and *Odyssey*, Hobbes proves by his choice of words that of harmony, elegance, and energy of style he had no manner of conception. The work is in every respect unpleasing, being nothing more than a fictitious narrative, delivered in mean prose, with the additional meanness of harsh rhyme and untuneable measures.¹ Pope also has characterised the poetry of Hobbes as too mean for criticism. However, these translations may fairly be looked on as never intended to meet the eye of the reviewer; they were only the amusement of the translator’s old age. Hobbes died on the 4th of December, 1679, in his ninety-second year.

We can here only briefly allude to the position of Hobbes in the history of philosophy, for his real eminence and influence lay in the domain of politics. In philosophy, however, Hobbes is decidedly the precursor of modern Materialism: and all our knowledge is made by him to rest upon

¹ *Essay on Poetry and Music.*

experience. We shall now proceed to a brief analysis of the *Leviathan*, and the parallel works by which it is illustrated, so far as they relate to Jurisprudence. Hobbes has hitherto been strangely neglected by historians of philosophy. Dugald Stewart, in his historical dissertation¹, bestows only three pages of careless criticism upon our author; Sir James Mackintosh, although one of the first to perceive his importance, could afford no space for an analysis in his brilliant, yet somewhat sketchy, essay; Mr. Hallam has been the first carefully and laboriously to peruse the *Leviathan* and comment upon its doctrines.

The *Leviathan* commences with a description of the means whereby the body politic is constructed. Nature, the art whereby God hath made and governs the world, is by the art of man, as in many other things so in this also imitated, that it can make an artificial animal. Art goes yet farther in imitating that rational and most excellent work of Nature—man. For by art is created that great *leviathan* called a Commonwealth, which is but an artificial man, though of greater stature and strength than the natural, for whose protection and defence it was intended; and in which the sovereignty is an artificial soul as giving life and motion to the whole body; the magistrates and other officers of judicature and executive, artificial joints; reward and punishment, by which, fastened to the seat of the sovereignty, every joint and member is moved to perform his duty, are the nerves that do the same in the body natural; the wealth and riches of all the particular members are the strength; *salus populi*, the people's safety, its business; counsellors, by whom all things needful for it to know are suggested unto it, are the memory; equity and laws, an artificial reason and will; concord, health; sedition, sickness; and civil war, death; lastly, the pacts and covenants by which the parts of this body politic were at first made, set together, and united, resemble that fiat pronounced by God in the creation. To describe the nature of this artificial man, Hobbes proposes to consider, first, the matter thereof and the artificer; both

¹ Encycl. Brittan.

which is man : secondly, how and by what covenants it is made ; what are the rights and just power or authority of a sovereign, and what it is that preserves or dissolves it ; thirdly, what is a Christian commonwealth ; lastly, what is the kingdom of darkness.¹

Hobbes, following Bacon, in regarding physics the mother of the sciences, considered it was necessary to know the animal and material nature of man before we could proceed to the study of his mind, or the discussion of the varied combinations of society. And before entering upon the political doctrines of the Leviathan it may not be inapposite to give a brief sketch of Hobbes' metaphysical system.

The thoughts of men, says Hobbes, are every one a representation or appearance of some quality or other accident of a body without us, which is commonly called an object, which object works on the eyes, ears, and other parts of a man's body ; and by diversity of working produces diversity of appearances. The original of them all is that which we call sense, for there is no conception in a man's mind which hath not at first totally or by parts been begotten upon the organs of sense. The rest are derived from that original.²

That when a thing lies still, unless somewhat else stir it, it will lie still for ever, is a truth that no man doubts of. But when a thing is in motion it will eternally be in motion unless somewhat else stay it, though the reason be the same, namely, that nothing can change itself, is not so easily assented to. For men measure not only other men, but all other things by themselves ; and because they find themselves subject, after motion, to pain and lassitude, think everything else grows weary of motion and seeks repose of its own accord ; little considering whether it be not some other motion wherein that desire of rest they find in themselves consists.³

When a body is once in motion it moves, unless something else hinders it, eternally ; and whatsoever hinders it, cannot in an instant, but in time, and by degrees, quite extinguish it ;

¹ Leviathan, end of Preface.

² Leviathan, cap. i.

³ Ibid. cap. ii.

and as we see in the water, though the wind cease, the waves do not give over rolling for a long time; so also it happens in that motion which is made on the external parts of man when he sees dreams. For after the object is removed, or the eye shut, we still retain an image of the thing seen, though more obscure than when we see it. And this it is the Latins call imagination, from the image made in seeing; and apply the same, though improperly, with the other senses. But the Greeks call it fancy, which signifies appearance, and is as proper to one sense as another. Imagination is, therefore, nothing but decaying sense; and is found in men and many other living creatures as well sleeping as waking.¹

The longer the time is after the sight or sense of any object, the weaker is the imagination. For the continual change of man's body destroys in time the parts in which sense was moved, so that distance of time and of place has one and the same effect in us. For as at a great distance of place that which we look at appears dim and without distinction of the smaller parts; and as voices grow weak and inarticulate, so also after great distance of time our imagination of the past is weak; and we lose, for example, of cities we have seen many particular streets, and of actions many particular circumstances. This decaying sense, when we would express the thing itself, that is, fancy, is called Imagination; but when we would express the decay, and signify that the sense is fading, old, and past, it is called Memory. Much memory, or memory of many things, is called Experience.²

The third chapter of the *Leviathan*, of the consequence or train of imagination, contains the elements of the theory of Association touched upon afterwards by Locke, and developed by Hartley. By consequence or train of thoughts Hobbes understands that succession of one thought to another which is called mental discourse. When a man thinks on anything, whatsoever is next thought after is not altogether so casual as it seems to be. Not every thought to every thought

¹ *Leviathan*, cap. ii.

² *Ibid.*

succeeds indifferently. And this train of thoughts or mental discourse is of two sorts. The first is unguided, without design, and inconstant; wherein there is no passionate thought to govern and direct those that follow, to itself, as the end and scope of some desire or other passion, in which case the thoughts are said to wander, and seem impertinent one to another, as in a dream. The second is more constant, being regulated by some desire and design. For the impression made by such things as we desire or fear is strong and permanent, or if it cease for a time, of quick return; so strong it is sometimes, as to hinder and break our sleep. And the train of regulated thoughts is of two kinds; one, when of an effect imagined we seek the causes or means that produce it; and this is common to man and beast. The other is, when imagining anything whatsoever we seek all the possible effects that can by it be produced; that is to say, we imagine what we can do with it when we have it.

The fourth chapter of the *Leviathan*, on Speech, has been considered the most valuable, as well as original, in the writings of Hobbes. The invention of printing, though ingenious compared with the invention of letters, was no great matter. It is a profitable invention for continuing the memory of time past, and the conjunction of mankind dispersed into so many and distant regions of the earth. But the most noble and profitable inventions of all others was that of speech, consisting of names or appellations, and their connection; whereby men register their thoughts, recall them when they are past, and also declare them one to another for mutual utility and conversation; without which there had been amongst men neither commonwealth nor society, nor contact, nor peace, no more than among lions, bears, and wolves. The first author of speech was God himself, that instructed Adam how to name such creatures as he presented to his sight; for the Scripture goes no further in this matter. But this was sufficient to direct him to add more names, as experience and use of the creatures should give him occasion, and to join them in such manner, by degrees, as to make himself understood; and so, by succession of time, so much lan-

guage might be gotten as he had found use of, though not so copious as an orator or philosopher requires.¹

The general use of speech is to transfer our mental discourse into verbal, or the train of our thoughts into a train of words; and that for two commodities, whereof one is the registering of the consequences of our thoughts, which, being apt to slip out of our memory, and put us to a new labour, may again be recalled by such words as they were marked by; so that the first use of names is to serve for marks or notes of remembrance. Another is, when many use the same words to signify, by their connection and order one to another, what they conceive or think of each other; and also what they desire, fear, or have any other passion for. And for this use they are called Signs. Special uses of speech are these: first, to register what, by cogitation, we find to be the cause of anything present or past, and what we find things present or past may produce or effect, which, in some, is acquiring of arts; secondly, to show to others that knowledge which we have attained, which is to counsel and back one another; thirdly, to make known to others our wills and purposes, that we may have the mutual help of one another; fourthly, to please and delight ourselves and others, by playing with our words for pleasure or ornament innocently.²

Seeing then that truth consists in the right ordering of names in our affirmations, a man that seeks precise truth has need to remember what every name he uses stands for, and to place it accordingly, or else he will find himself entangled in words, as a bird in lime twigs, the more he struggles the more belimed; and, therefore, in geometry, which is the only science that it hath pleased God hitherto to bestow on mankind, men begin at settling the significations of their words, which settling of significations they call definitions, and place them in the beginning of their reckoning. By this it appears how necessary it is for every man that aspires to true knowledge, to examine the definitions of former authors; and either to correct them where they are negligently set down, or to make them himself. For the errors of definitions multiply them-

¹ *Leviathan*, cap. iv.

² *Ibid.*

selves according as the reckoning proceeds, and lead men into absurdities which at last they see but cannot avoid without reckoning anew from the beginning, in which lies the foundation of their errors; whence it happens that they who trust to books do as they that cast up many little sums into one greater, without considering whether those little sums were rightly cast up or not; and last, finding the error visible, and not mistrusting their first grounds, know not which way to clear themselves, but spend time in fluttering over their books; as birds that enter by the chimney, and finding themselves enclosed in a chamber, flutter at the false light of a glass window, for want of wit to consider which way they came in. Thus in the right definition of names lies the first use of speech, which is the acquisition of science; and in wrong or no definitions lies the first abuse; from which proceed all false and senseless tenets; which make those men that derive their instruction from the authority of books, and not from their own meditation, to be as much below the condition of ignorant men, as men endued with true science are above it. For between true science and erroneous doctrines, ignorance is in the middle. Natural sense and imagination are not subject to absurdity. Nature itself cannot err; and as men abound in copiousness of language, so they become more wise or more mad than ordinary. Nor is it possible, without letters, for any man to become either excellently wise or, unless his memory be hurt by disease or ill constitution of organs, excellently foolish; for words are wise men's counters, they do but reckon by them; but they are the money of fools that value them by the authority of an Aristotle, a Cicero, or a Thomas, or any other doctor whatsoever, if but a man.¹

When a man upon the hearing of any speech has those thoughts which the words of that speech and their connection were ordained and constituted to signify, then he is said to understand it; understanding being nothing else but conception caused by speech; and, therefore, if speech be peculiar to man, as for aught is known it is, then is understanding

¹ *Leviathan*, cap. iv.

peculiar to him also: and, therefore, of absurd and false affirmations, in case they be universal, there can be no understanding; though, many think they understand them when they repeat the words softly, or con them in their mind. * * * The names of such things as affect us, that is which please and displease us, because all men are not alike affected with the same thing, nor the same men at all times, are in the common discourses of men of inconstant signification. For seeing all names are imposed to signify our conceptions, when we conceive the same things differently, we can hardly avoid different naming of them. For though the nature of that we conceive be the same; yet the diversity of our reception of it, in respect of different constitutions of body, and prejudices of opinion, gives everything a tincture of our different passions; and therefore, in reasoning, a man must take heed of words; which, besides the signification of what we imagine their nature, have a signification also of the nature, disposition, and interest of the speaker; such as are the names of virtues and vices; for one man calls wisdom what another calls fear; and one cruelty what another justice; one prodigality what another magnanimity; and one gravity what another stupidity. And, therefore, such names can never be true grounds of any ratiocination. No more can metaphors and tropes of speech; but these are less dangerous, because they profess their inconstancy, which the other do not.¹

When a man reasons he does nothing else but conceive a sum total, from addition of parcels; or conceive a remainder, from subtraction of one sum from another. Reason in this sense is nothing else but reckoning,—that is, adding and subtracting of the consequences of general names agreed upon for the marking and signifying of our thoughts, marking when we reckon by ourselves, and signifying when we demonstrate or approve our reckonings to other men.²

Reason is not, as sense and memory, born with us; we gather by experience only; as prudence is but obtained by industry; first in apt improving of names; and secondly by getting a good and orderly method in proceeding from the

¹ *Leviathan*, cap. iv. finis.² *Ibid.* cap. v.

elements which are names to assertions made by connection of one of them to another, and so to syllogisms, which are the connecting of one assertion to another, till we come to a knowledge of all the consequences of names appertaining to the subject in hand ; and that is it men call Science. And whereas sense and memory are but knowledge of fact, which is a thing past and irrevocable, science is the knowledge of consequences, and dependence of one fact upon another, by which, out of that which we can presently do, we know how to do something else when we will, or the like another time ; because when we see how anything comes about, upon what causes, and by what manner, when the like causes come into our power, we see how to make it produce the like effects.¹

No discourse whatever can end in absolute knowledge of fact past or to come. For as for the knowledge of fact, it is originally sense ; and even after memory, and for the knowledge of consequence, it is not absolute, but conditional. No man can know, by discourse, that this or that is, has been, or will be, which is to know absolutely ; but only that if this be, that is ; if this has been, that has been ; if this shall be, that shall be : which is to know conditionally ; and that not the consequence of one thing to another ; but of one name of a thing to another name of the same thing. And therefore, when the discourse is put into speech and begins with the definitions of words, and proceeds by connection of the same into general affirmations, and of these again into syllogisms, the end or last sum is called the conclusion, and the thought of the mind signified by it is that conditional knowledge of the consequence of words which is commonly called science. But if the first ground of such discourse be not definitions, or if the definitions be not rightly joined together into syllogisms, then the end or conclusion is again opinion, namely, of the truth of something said, though sometimes in absurd and senseless words, without possibility of being understood.²

Belief, which is the admitting of propositions upon trust in many cases, is no less free from doubt than perfect and manifest knowledge ; for as there is nothing whereof there is not some cause, so where there is doubt there must be some cause

¹ *Leviathan*, cap. v.

² *Ibid.* cap. vii.

thereof conceived. Now there be many things which we receive from the report of others, of which it is impossible to imagine any cause of doubt; for what can be opposed against the consent of all men, in things they can know and have no cause to report otherwise, than they are such as is great part of our histories, unless a man could say that all the world had conspired to deceive him.¹

The ninth chapter of the *Leviathan* is on the several subjects of knowledge. There are of knowledge two kinds, whereof one is knowledge of fact, the other knowledge of the consequence of one affirmation to another. The former is nothing else but sense and memory, and is absolute knowledge; as when we see a fact doing or remember it done: and this is the knowledge required in a witness. The latter is called science, and is conditional; as when we know that if the figure shown be a circle, then any straight line through the centre shall divide it into two equal parts. And this is the knowledge required in a philosopher; that is to say of him that pretends to reasoning. The register of knowledge of fact is called history; whereof there are two sorts; one called natural history, which is the history of such facts or efforts of nature as have no dependence on the will; such are the histories of metals, plants, animals, regions, and the like. The other is civil history; which is the history of the voluntary actions of men in commonwealth. Hobbes then proceeds to give a synoptical chart of science,—that is, knowledge of consequence, or philosophy. This is part divided into natural and civil philosophy. Natural philosophy includes consequences from the accidents common to all bodies natural; which are quantity and motion, and also physics or consequences from quality. This first division of natural philosophy includes geometry, arithmetic, astronomy, geography, mechanics, navigation. Physics is again divided into consequences from the qualities of bodies transient, such as sometimes appear and sometimes vanish, — meteorology; and consequences from the qualities of bodies permanent, such as the stars, the atmosphere, or terrestrial bodies. The consequences from the qualities of bodies terrestrial are divided into consequences

¹ Hum. Nat. c. vi.

from the parts of the earth that are without sense, and consequences from the qualities of animals; these last again are divided into consequences, from the qualities of animals in general, under which he reckons optics and music, and consequences derived from the qualities of men in special, which result in ethics, poetry, rhetoric, logic, and the science of the just and unjust.¹

This is the substance of the philosophy of Hobbes so far as it relates to the intellectual qualities. Next follows the analysis of the passions. We now approach those portions of his philosophy which have always excited indignation. Nor can we conceive how it was possible for one possessed of the intellect of our author to attempt to construct a scheme of society by ignoring the social affections of mankind.

Hobbes, in his analysis of the passions and affections, thrusts forward the selfish system in its most repulsive form. And the definitions on these subjects in *The Human Nature* and the *Leviathan*, distort facts of which all men are conscious, and do violence to the language in which the result of their uniform experience is conveyed. Thus, according to his theory, "acknowledgment of power is called Honour;" — "Pity is the imagination of future calamity to ourselves, proceeding from the sense of another man's calamity;" — "Laughter is occasioned by sudden glory in our eminence, or in comparison with the infirmity of others;" — "Love is a conception of his need of the one person desired;" — "Good will or charity, which containeth the natural affection of parents to their children, consists in a man's conception that he is able not only to accomplish his own desires, but to assist other men in theirs;" — from which it follows, as the pride of power is felt in destroying as well as in serving men, that cruelty and kindness are the same passion. Such a definition of Love, as it excludes kindness, might perfectly well comprehend the hunger of a cannibal, provided it were not too ravenous to exclude choice. These were the expedients to which Hobbes was driven in order to evade the admission of the simple truth, that there are in our nature disinterested

¹ *Leviathan*, cap. ix.

passions, which seek the well-being of others as their object and end.¹

The eleventh chapter of the *Leviathan* is on Manners, by which Hobbes means those qualities of mankind which concern their living together in peace and unity. This is full of the selfish system. Competition of riches, honour, command, or other power, inclines to contention, enmity, and war; because the way of one competitor to the attaining of his desire is to kill, subdue, supplant, or repel the other. Particularly competition of praise inclines to a reverence of antiquity; for men contend with the living, not with the dead—to these ascribing more than due that they may obscure the glory of the other. Love of virtue is stated to arise from love of praise; whilst, to have received from one to whom we think ourselves equal greater benefits than there is hope to requite, disposes to counterfeit love, but really secret hatred, and puts a man into the estate of a desperate debtor, that in declining the right of his creditor, tacitly wishes him there, where he might never see him more. For benefits oblige, and obligation is thralldom; and unrequitable obligation perpetual thralldom. But to have received benefits from one whom we acknowledge far superior inclines to love; because the obligation is no new depression; and cheerful acceptance, which men call gratitude, is such an honour done to the obligee as is taken generally for retribution. Also to receive benefits, though from an equal or inferior, as long as there is hope of requital, disposes to love; for in the intention of the receiver, the obligation is of aid and service mutual, from whence proceeds an emulation of who shall exceed in benefiting; the most noble and profitable contention possible, wherein the victor is pleased with his victory, and the other revenged by conferring it.²

Eloquence, with flattery, disposes men to confide in them that have it; because the former is seeming wisdom, the latter, seeming kindness. Add to them military reputation; and it disposes men to adhere and subject themselves to those men that have them;—the two former having given them

¹ Mackintosh, *Eth. Phil.*

² *Leviathan*, cap. ix.

caution against danger from him, the latter gives them caution against danger from others. Want of science, that is, ignorance of causes, disposes, or rather constrains, a man to rely on the advice and authority of others. For all men, whom the truth concerns, if they rely not on their own, must rely on the opinion of some other, whom they think wiser than themselves, and see not why he should deceive them. Ignorance of the signification of words, which is want of understanding, disposes men to take on trust, not only the truth they know not, but also the errors; and, which is more, the nonsense of them they trust; for neither error nor nonsense can, without a perfect understanding of words, be detected.¹

Ignorance of the causes and original constitution of right, equity, law and justice, disposes a man to make custom and example the rule of his actions, in such manner as to think that unjust which it hath been the custom to punish; and that just, of the impunity and approbation whereof they can produce an example; or, as the lawyers, who use only this false measure of justice, barbarously call it, a precedent — like little children, that have no other rule of good and evil names, but the correction they receive from their parents and masters — save that children are constant to their rule, whereas men are not so, because, grown old and stubborn, they appeal from custom to reason, and from reason to custom, as it serves their turn: receding from custom when their interest requires it, and setting themselves against reason as oft as reason is against them, which is the cause that the doctrine of right and wrong is perpetually despised both by the pen and sword; whereas the doctrine of lines and figures is not so, because men care not in that subject what be truth, as a thing that crosses no man's ambition, profit, or lust. "For I doubt not," says Hobbes, "that if it had been a thing contrary to any man's right of dominion, or to the interest of men that have dominion, that the three angles of a triangle should be equal to the two angles of a square, that doctrine should have been, if not disputed, yet by the

¹ *Leviathan*, cap. ix.

burning of all books of geometry, suppressed, as far as he whom it concerned was able."¹

The Ethical system of Hobbes excluded all the benevolent and social affections of our nature. Moral good he considers merely as consisting in the signs of a power to produce pleasure; and repentance is no more than regret at having missed the way; so that, according to this system, a disinterested approbation of, and reverence for virtue, are no more possible than disinterested affections towards our fellow-creatures. There is no sense of duty, no compensation for our own offences, no indignation against the crimes of others, unless they affect our own safety—no secret cheerfulness shed over the heart by the practice of well doing. From his philosophical writings it would be impossible to conclude that there are in man a set of emotions, desires, and aversions, of which the sole and final objects are the voluntary actions and habitual dispositions of himself and of all other voluntary agents, which are properly called moral sentiments, and which, though they vary more in degree, and depend more on cultivation, than some other parts of human nature, are as seldom as most of them found to be entirely wanting.²

It must be observed that in Hobbes's system of Politics the treatises *De Cive*, *De Corpore Politico*, and the *Leviathan* bear nearly the same relation to one another as Bacon's *Advancement of Learning* does to the treatise *De Augmentis Scientiarum*.

Wisdom is the perfect knowledge of truth in all matters whatsoever. This being derived from the registers and records of things, cannot possibly be the work of a sudden acuteness, but of a well-balanced reason, which, by the compendium of a word, we call philosophy. And the tree of philosophy divides itself into so many branches, as there are sorts of things which properly fall within the cognisance of reason.³ In the treatise on Government and Society, Hobbes proposes briefly to describe the duties of men, first as men; then as subjects; lastly, as Christians. Under which duties

¹ *Leviathan*, cap. x.

² Mackintosh, *Eth. Phil.*

³ *Elementa Philosophica de Cive*, Epist. Dedicat.

are contained not only the elements of the laws of nature and nations, together with the true original and power of justice ; but also the very essence of the Christian religion itself. In that part of the work entitled " Liberty," he proceeds to demonstrate, in the first place, that the state of men without civil society, which state is termed the state of nature, is nothing else but a mere war of all against all ; and in that war all men have equal right with all things. But men, as soon as they arrive to understanding of this hateful condition, desire, even nature itself compelling them, to be freed from this misery. And as this cannot be done, except by compact, they all quit that right they have to all things. He then declares and confirms what the nature of that compact is, how and by what means the right of one might be transferred to another, to make their compacts valid, and what those dictates of reason are which may properly be termed the laws of nature. These grounds being laid in the part of the work entitled " Dominion," he shows what civil government is, and the supreme power in it, and the different kinds of it.¹

The faculties of human nature may be reduced, according to Hobbes, into four kinds — bodily strength, experience, reason, and passion. Taking the beginning of his doctrine from these, he proposes to declare, in the first place, what manner of inclinations men who are endowed with these faculties bear towards one another, and whether and by what faculty they are born apt for society ; then to show what are the conditions of society, or of human peace,—that is to say, changing the words only,—what are the fundamental laws of nature.

The opinion of the Greek philosophers is controverted, who suppose that man is a creature born fit for society, and term him *ζῷον πολιτικόν*. All society, says Hobbes, in a vicious train of false reasoning, is either for gain or for glory—that is, not so much for love of our fellows as for the love of ourselves. But no society can be great or lasting, which begins from vain-glory. Because that glory is like honour ; if all men have it, no man hath it,—for they consist

¹ De Cive, Preface.

in comparison and pre-excellence. Neither does the society of others advance any whit the cause of my glorying in myself; for every man must account himself such as he can make himself without the help of others. But though the benefits of this life may be much furthered by mutual help, yet, since those may be better attained by dominion than the society of others, no one will doubt but that men would much more greedily be carried by nature, if all fear were removed, to obtain dominion than to gain society. It is therefore concluded by Hobbes that the original of all great and lasting societies consisted not in the good-will men had towards one another, but in mutual fear.¹

All men are by nature equal. Amongst the many dangers with which the natural desires of men threaten one another, to take care of one's self is the most important concern. For every man is desirous of what is good for him, and shuns what is evil, but chiefly the chiefest of natural evils — death. And this is done by an impulsion of nature no less than that whereby a stone moves downward. It is, therefore, agreeable to right reason for a man to use all his endeavours to preserve and defend himself from all dangers. And all men account that right which is agreeable to right reason. For nothing else is signified by the word right, than that liberty which every man has to use his natural faculties according to right reason. Therefore the first foundation of natural right is this, — that every man may, as far as he can, protect his life and limbs: — *Itaque juris naturalis primum fundamentum est, ut quisque vitam et membra sua quantum potest tueatur.*²

Nature has given to every man a right to all; that is, it was lawful for every man, in the bare state of nature, to possess, use, and enjoy all what he could. But it was the least benefit for men thus to have a common right to all things. For the effects of this right are the same almost as if there had been no right at all. For although every man might say of everything, this is mine, yet could he not enjoy it, by reason of his neighbour, who, having equal right and power, would pretend the same thing to be his. Thus a

¹ De Cive, cap. i. s. 2

² Ibid. cap. i. s. 7.

state of man without society is the state of war; and nature dictates the seeking after peace.¹

Since all grant that is done by right which is not done against reason, those actions only ought to be judged wrong which are repugnant to right reason, that is, which contradict some certain truth collected by right reasoning from true principles. But that which is done wrong, we say is done against some law; therefore, true reason is a certain law, which, since it is no less a part of human nature, than any other faculty or affection of the mind, is also termed nature. Therefore the law of nature is the dictate of right reason conservant about those things which are either to be done or omitted for the constant preservation of life and limbs: — *Est igitur lex naturalis dictamen rectæ rationis circa ea quæ agenda vel omittenda sunt ad vitæ membrorumque conservationem, quantum fieri potest, diuturnam.*²

The first and fundamental Law of Nature is, that peace is to be sought after wherever it may be found, and where not that we must provide ourselves with the aids for war. And one of the natural laws derived from this fundamental one is this; that the right of all men to all things ought not to be retained; but that some certain rights ought to be transferred or relinquished. For if every one would retain his right to all things, it must necessarily follow, that some by right might invade, and others by the same right might defend themselves against them. Hence war would follow.³

After this follow dissertations on the abandonment and transfer of rights. A contract is the act of two in transferring their rights. A covenant is an act wherein we pass away our rights by words signifying the future. From contracts or covenants we are freed in two ways — by performance or by release.⁴

The second Law of Nature is to perform contracts, or to keep faith. In the third chapter *De Cive*, on the remaining Laws of Nature, Hobbes gives a brief code of morality. And the moral and natural laws are declared to be the same.

¹ *De Cive*, cap. i. ss. 10—15.

³ *Ibid.* s. 3

² *De Cive*, cap. ii. s. i.

⁴ *Ibid.* ss. 9—15.

The observance of justice is never against reason; for if ever its violation may have turned out unsuccessfully, this being contrary to probable expectation ought not to influence us. That which gives to human actions the relish of justice is a certain nobleness or gallantness of courage rarely found; by which a man scorns to be beholden for the contentment of his life to fraud or breach of promise.¹

The laws of nature oblige *in foro interno*; that is to say, they bind to a desire they should take place; but *in foro externo*, that is, to the putting them in act not always. For he that should be modest and tractable, and perform all he promises in such time and place, where no man else should do so, should but make himself a prey to others, and procure his own certain ruin, contrary to the ground of all laws of nature, which tend to nature's preservation. And again, he that having sufficient security that others shall observe the same laws towards him, observes them not himself, seeketh not peace but war; and consequently the destruction of his nature by violence. And whatsoever laws bind *in foro interno*, may be broken, not only by a fact contrary to the law but also by a fact according to it, in case a man think it contrary; for though his action in this case be according to law, yet his purpose was against the law; which, where the obligation is *in foro interno*, is a breach. The laws of nature are immutable and eternal; for injustice, ingratitude, arrogance, pride, iniquity, acception of persons, and the rest, can never be made lawful; for it can never be that war shall preserve life, and peace destroy it.²

The fifth chapter of the treatise *De Cive* treats of the causes and first beginning of civil government. It is manifest that the actions of men proceed from the will, and the will from hope and fear, inasmuch as where they shall see a greater good or less evil likely to happen to them by the breach than by the observation of the laws, they will knowingly violate them. The hope, therefore, which each man has of his security and self-preservation, consists in this, that by force or craft he may disappoint his neighbour; wherefore, says Hobbes, the laws of nature suffice not for the preservation of peace.

¹ *Leviathan*, cap. xv.

² *Ibid.*

The seventeenth chapter of the *Leviathan*, corresponding to the fifth chapter *De Cive*, is entitled *Of the Causes, Generative and Definitive, of a Commonwealth*. The final cause, end, or design of men who naturally love liberty and dominion over others, in the introduction of that restraint upon themselves, in which we see them live in commonwealths, is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of war which is necessarily consequent to the natural passions of men, when there is no visible power to keep them in awe, and tie them, by fear of punishment, to the performance of their covenants and the observation of the laws of nature; for the laws of nature, as justice, equity, modesty, mercy, and in one word, — doing to others as we would be done to, of themselves, without the terror of some power to cause them to be observed, are contrary to our natural passions. For covenants without the sword are but words, and of no strength to secure a man at all. Nor is it the joining together of a small number of men that gives them this security. And, also, if there be ever so great a multitude; yet, if their actions be diverted according to their particular judgments, and particular appetites, they can expect thereby no defence nor protection neither against a common enemy, nor against the injuries of one another; for being distracted in opinions concerning the best use and application of their strength, they do not help but hinder one another; and reduce their strength by mutual opposition to nothing; whereby they are easily not only subdued by a very few that agree together, but also, when there is no common enemy, they make war upon each other, for their particular interests; for if we could suppose a great multitude of men to consent in the observation of justice, and other laws of nature without a common power to keep them all in awe, we might as well suppose all mankind to do the same; and then there neither would be, nor need to be, any civil government or commonwealth at all; because there would be peace without subjection.¹

¹ *Leviathan*; cap. xvii.

The only way to avert such a common power as may be able to defend men from the invasion of foreigners, and the injuries of one another, and thereby to secure them in such good as that, by their own industry and by the fruits of the earth, they may nourish themselves and live contentedly, is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, into one will, which is as much as to say, to appoint one man, or assembly of men, to bear their person; and every one to own and acknowledge himself to be author of whatsoever he that so beareth their person shall act, or cause to be acted, in those things which concern the common peace and safety, and therein to submit their wills, every one to his will, and their judgments to his judgment. This is more than consent or concord, it is a real unity of them all in one and the same person, made by covenant of every man with every man, in such manner as if every man should say to every man, I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition, that these give up their right to him, and authorise all his actions in like manner. This is the generation of the great Leviathan, or mortal God, to whom, under the immortal God, we owe our peace and defence; in him is the essence of the commonwealth; he is the King of the Sword; yet there is that in heaven, though not on earth, of which he should stand in fear.¹

This person, including an assembly as well as an individual, is the sovereign, and possesses sovereign power. Such power may be acquired in two ways—by agreement or by force. A commonwealth is said to be instituted when a multitude of men agree that whatever the majority agree to shall bind the whole. The consequences of this are, that the subjects cannot change the form of government, nor can the sovereign power be forfeited. No man can, without injustice, protest against the constitution of the sovereign declared by the majority. Again, because every subject is, by this institu-

¹ *Leviathan*, cap. xvii. xxviii.

tion, author of all the actions and judgments of the sovereign instituted, it follows that whatsoever he does it can be no injury to any of his subjects, nor ought he to be by any of them accused of injustice, for he that does anything by authority from another does therein no injury to him by whose authority he acts; but by this institution of a commonwealth every particular man is author of all the sovereign does; and consequently he that complains of injury from his sovereign, complains of that whereof he is himself author, and therefore ought not to accuse any man but himself; no nor himself of injury, because to do injury to oneself is impossible. It is true that they that have sovereign power may commit iniquity, but not injustice or injury, in their proper signification.¹

The sovereign is judge of whatever is necessary for the peace or defence of his subjects; is judge of what doctrines ought to be taught them; has the right of making rules whereby the subjects may every man know what is so his own as no other subject can, without injustice, take it from him; to him also belongs the right of judicature, of making war and peace, of choosing all counsellors and ministers, of rewarding and punishing. These rights are indivisible and incommunicable, and by no grant can pass away without direct renunciation of the sovereign power.²

There are three simple forms of government—monarchy, aristocracy, and democracy. The first is lavishly extolled. Where the public interest and private interest are most closely united there is the public most advanced. But in monarchy the private interest is the same with the public. The riches, power, and honour of a monarch arise only from the riches, strength, and reputation of his subjects. For no king can be rich, nor glorious, nor secure, whose subjects are either poor or contemptible, or too weak through want or dissension, to maintain a war against their enemies; “whereas in a democracy or aristocracy,” says Hobbes, “the public prosperity confers not so much to the private fortune of one that

¹ *Leviathan*, cap. xviii.

² *Ibid.*

is corrupt or ambitious, as doth many times a perfidious advice, a treacherous action, or a civil war." A monarch receives counsel when, where and of whom he pleases. But when a sovereign assembly has need of counsel none are admitted except such as have a right thereto from the beginning. The resolutions of a monarch are subject to no other inconsistency than that of human nature; but in assemblies, besides that of nature, there arises an inconsistency from the number. A monarch cannot disagree with himself out of envy or interest, but an assembly may, and that to such a height as may produce a civil war.¹

In monarchy there is this inconvenience: that any subject, by the power of one man, for the enriching of a favourite or flatterer, may be deprived of all he possesses. But the same may as well happen in a sovereign assembly. For their power is the same, and they are as subject to evil counsel, and to be seduced by orators, as a monarch by flatterers; and whereas the favourites of monarchs are few, and they have none to advance but their own kindred, the favourites of an assembly are many, and the kindred much more numerous than of any monarch. Besides, there is no favourite of a monarch who cannot as well succour his friends as hurt his enemies; but orators,—that is to say, favourites of sovereign assemblies,—though they have great power to hurt, have little to save. For to accuse requires less eloquence than to excuse. Such is man's nature.²

The elective or limited king is not the sovereign, but the minister of the sovereign. The question of the right of succession takes place only in an absolute monarchy. For those who exercise the supreme power for a time only are no monarchs but ministers of state. Hobbes strangely decides that a monarch may dispose of his government by testament, or give it away, or sell it. A monarch dying without a will is, however, understood to will that a monarch should succeed him, and further, one of his sons. But because the sons are equal, and the power cannot be divided, the eldest shall

¹ *Leviathan*, cap. xix.

² *Ibid.* cap. xix.

succeed. For if there be any difference, by reason of age the eldest is supposed the most worthy. But if the brothers must be equally valued, the succession shall be by lot. Now primogeniture is a natural lot, and by this the eldest is already preferred.¹

The twelfth chapter De Cive discusses the internal causes tending to the dissolution of government. The following opinions are condemned by Hobbes as seditious and adverse to civil society:—That the judging of good and evil belongs to private persons; that subjects may sin by obeying their princes; that tyrannicide is lawful; that those who have the supreme power are subject to the civil laws; that the supreme power may be divided; that each subject has a property or absolute dominion of his own goods.²

All the duties of rulers are contained in the one sentence—*salus populi, lex suprema*. For although they who amongst men obtain the chiefest dominion cannot be subject to laws, properly so called, that is to say, to the will of men, because to be chief and subject are contradictory; yet it is their duty in all things, as much as possibly they can, to yield obedience to right reason, which is the natural, moral, and divine law. But because empires were constituted for the sake of peace, he who, being placed in authority, shall use his power otherwise than to the safety of the people, will act against the reasons of peace, that is to say, against the laws of nature. The benefits of subjects respecting this life only may be distributed into four kinds:—that they be defended against foreign enemies; that peace be preserved at home; that they be enriched as much as may consist with public security; that they enjoy a harmless liberty. For supreme commanders can confer no more to their civil happiness than that being preserved from foreign and civil wars they may quietly enjoy that wealth which they have purchased by their own industry.³

A right instruction of subjects in civil doctrines is

¹ De Cive, cap. ix. ss. 9—19.

² Ibid. cap. xii. ss. 1—7.

³ Ibid. cap. xiii. ss. 1—6.

necessary for the preservation of peace; and there ought to be an equal distribution of public burthens. Hobbes argues against an income-tax, and erroneously decides in favour of indirect against direct taxation.⁴

Law has been often confounded with counsel, covenant, and right. The distinction between counsel and law must be fetched from the distinction between counsel and command. Counsel is a precept in which the reason of obeying is taken from the thing itself which is advised, but command is a precept in which the cause of my obedience depends on the will of the commander. For "sic volo, sic jubeo," is not properly said unless the will stand for the reason. Now when obedience is yielded to the laws, not for the thing itself, but for the will of the adviser, law is not a counsel but a command, and is defined as the command of that person, whether man or court, whose command contains the reason of obedience:—"Lex est mandatum ejus personæ sive hominis sive curiæ, cujus præceptum continet obedientiæ rationem."¹

"Law," says Hobbes, "is confounded with covenant by those who conceive the laws to be nothing else but certain *ὁμολογήματα*, or forms of living determined by the common consent of men. Among whom is Aristotle, who defines law thus:—*Νόμος ἔστι λόγος ὁρίσμενος καθ' ὁμολογίαν κοινὴν πόλεως, μὴνῶν πῶς δεῖ πράττειν ἕκαστα*; that is to say, law is a speech, limited according to the common consent of the city, declaring every thing that we ought to do."² However, it appears that the opinion of Aristotle, declaring laws to spring from the consent of the people, is preferable to that of Hobbes, declaring them to spring from the will of the legislator; though unquestionably whatever will be enforced by the supreme authority is a law.

After discussing in the *Leviathan* the various religious subjects mentioned in the Preface, Hobbes concludes by a review of the whole. From the contrariety of some of the natural faculties of the mind one to another, as also of one

¹ De Cive, cap. xiii. s. 11.

² Ibid. cap. xiv. s. 1.

³ Ibid. cap. xiv. s. 2.

passion to another, and from their reference to conservation, there has been an argument taken to infer an impossibility that any one man should be sufficiently disposed to all sorts of civil duty. The severity of judgment, it is said, makes men censorious, and unapt to pardon the errors and infirmities of other men ; and, on the other side, celerity of fancy makes the thoughts less steady than is necessary to discern exactly between right and wrong. Again, in all deliberations, and in all pleadings, the faculty of solid reasoning is necessary, for without it the resolutions of men are rash, and their sentences unjust ; and yet, if there be not powerful eloquence, which procures attention and consent, the effect of reason will be little. But these are contrary faculties, the former being grounded upon principles of truth, the other upon opinions already received, true or false ; and upon the passions and interests of men, which are different and mutable. And, considering the contrariety of men's opinions and manners in general, it is said to be impossible to entertain a constant civil amity with all those with whom the business of the world obliges us to converse, which business consists almost in nothing else but a perpetual contention for honour, riches, and authority. To which Hobbes answers, that they are indeed great difficulties, but not impossibilities, for by education and discipline they may be and are sometimes reconciled. Judgment and fancy may have place in the same man, but by turns, as the end which he aims at requires. So also reason and eloquence, though not, perhaps, in the natural sciences, yet in the moral, may stand very well together. For wheresoever there is place for adorning and preferring of error, there is much more place for adorning and preferring of truth, if they have it to adorn. Nor is there any repugnance between fearing the laws and not fearing a public enemy, nor between abstaining from injury and pardoning it in others.¹

To the laws of nature already enumerated there should be this added, that every man is bound by nature, as much as in

¹ *Leviathan*, Part IV.

him lies, to protect in war the authority by which he himself is protected in time of peace. For he that pretends a right of nature to preserve his own body, cannot pretend a right of nature to destroy him by whose strength he is preserved.¹

Hobbes in conclusion says, "There is nothing in this whole discourse, nor in that I writ before of the same subject in Latin, as far as I can perceive, contrary either to the Word of God, or to good manners, or to the disturbance of the public tranquillity. Therefore I think it may be profitably printed, and more profitably taught in the universities, in case they also think so, to whom the judgment of the same belongeth. For seeing the universities are the fountains of civil and moral doctrine, from whence the preachers and the gentry, drawing such water as they find, use to sprinkle the same both from the pulpit and in their conversation upon the people, there ought certainly to be great care taken, to have it pure, both from the renown of heathen politicians and from the incantation of deceiving spirits. And by that means the most men, knowing their duties, will be the less subject to serve the ambition of a few discontented persons in their purposes against the State, and be the less grieved with the contributions necessary for their peace and defence; and the governors themselves have the less cause to maintain at the common charge any greater army than is necessary to make good the public liberty, against the invasions and encroachments of foreign enemies. And thus I have brought to an end my Discourse of Civil and Ecclesiastical Government, occasioned by the disorders of the present time, without partiality, without application, and without other designs than to set before men's eyes the mutual relation between protection and obedience, of which the condition of human nature and the laws divine, both natural and positive, require an inviolable observation."²

The anticipation that Hobbes entertained of his philosophical opinions being publicly taught in the universities of the realm, has never been, and in all probability never will be

¹ *Leviathan*, Part IV.

² *Ibid.*

realised. Seldom has any book excited the clamour of opposition which the *Leviathan* encountered. "The philosopher of Malmesbury," says Dr. Warburton, "was the terror of the last age, as Tindall and Collins are of this. The press sweats with controversy, and every young churchman militant would try his arms in thundering on Hobbes's steel cap."¹ In effect Hobbes stood in opposition to every party of the political and ecclesiastical world in which he lived. By his determined advocacy of absolutist principles he alienated the Republicans. There could be no community of feeling or interest between those who on the one side advocated the rights of man, his natural liberty, his duty to resist oppression, and the philosopher who on the other side maintained that the ruling power could not be withdrawn from those to whom it had been committed, that sovereigns ought not to be punished for misgovernment; that the interpretation of the laws was to be sought not from the comments of philosophy, but from the authority of the ruler; that the will of the magistrate was the ultimate standard of right and wrong; and that his voice must be listened to by every citizen as the voice of conscience. Again, Hobbes protested against all ecclesiastical tyranny, and sought to subject the consciences of men almost solely to the civil power. His enemies among the theologians found abundance of passages in his works to justify their attacks upon his atheistical doctrines, his materialist philosophy; whilst in his ethical and political systems alike he ignored all the social affections of mankind. With Hobbes "there is no sense of duty, no compunction for our own offences, no indignation against the crimes of others, unless they affect our own safety; no secret cheerfulness shed over the heart by the practice of well doing."

"Such," says Dr. Whewell², are the consequences which result from taking man divested of any moral principles as the element of the world, and building up the frame of civil society by the mere juxtaposition of individuals. In this way is formed that great *Leviathan*, which in this system establishes and rules over

¹ *Divine Legation*, vol. ii. p. 9.

² *History of Moral Philosophy in England*, p. 19.

all human institutions, and even determines what shall be held as divine. In reading this account we are almost led to imagine to ourselves a monstrous idol composed of human beings, yet invested with the attributes of superhuman power, and worshipped as the creator of Justice and Law, Peace and Order, Truth and Religion. But, perhaps, you think such an image too strange, too monstrous, too terrible to be steadily dwelt upon. Not so. It is the image offered to us by the author of the *Leviathan* himself; offered, too, not in the vague lineaments and airy colours which words bestow, in which so many an uncouth and extravagant figure is presented without offending us, but carefully drawn as a visible picture in lines and shades. It is the frontispiece of his book, and I think no one can look at the representation without discovering in it a kind of grotesque sublimity. This is the picture:—Over a wide-spreading landscape, in which lie villages and cultivated fields, castles and churches, rivers and ports, predominates the vast form of the Sovereign, the *Leviathan*, the Mortal God. Its breast and head rise beyond the most distant hills, its arms stretch to the foreground of the picture. Its body and members are composed of thousands upon thousands of human figures, in the varied dresses of all classes of society, all with their faces turned towards the sovereign head, and bending towards it in attitudes of worship. The head has upon it a kingly crown, the right hand bears a mighty sword, the left a magnificent crosier. In the front of the picture is a city, with its gates and streets, its bastions and its citadel, in which high above all other edifices rise the towers of a noble cathedral. Nor is this figure, thus predominating over the country and the city, the only intimation how vast and comprehensive, how strong and terrible, is the power thus bodied forth. Below in various compartments are emblems of the provinces and instruments of this power. One side, a castle on a rock, from the battlements of which the smoke rolls, as a piece of ordnance is discharged; on the other a church, with a figure upon its roof of Faith, holding her cross, on one side the coronet, on the other the mitre. On the one side is a cannon—the thunderbolt of war, on the other the thunderbolts in their mythological form, indicating, perhaps, the fulminations of the ecclesiastical sovereign. On the one side are the peaceable arms of Logic, Syllogism, and Dilemma—spiritual and temporal arguments, on the other the sharper arguments of martial arms, to be used by nations when reason fails—lances and firelocks, drums and colours. Finally,

ART. IV.—PARLIAMENTARY REFORM AS AFFECTING LAW AMENDMENT.

THE friends of Law Amendment considering that the cause to which their energies are devoted is the most important of all the subjects within the cognizance either of the political philosopher or the practical politician, naturally feel no little anxiety at the announcement of a new plan of Parliamentary Reform. That the great measure of 1832 admits of material improvements; that in some respects a readjustment of its machinery is required; that nothing more absurd, at least no position more untenable, was ever advanced than what was termed the "*finality*"¹ declaration of Lord J. Russell;—no reflecting person who is unbiassed by personal or by party interests can possibly deny. We will even go a step further, and admit that the very feeble cry now raised for a further change in our electoral system, the kind of lull that now exists in the political atmosphere, affords some facilities to those who would again open the question, and may operate as an inducement with some, while others hang back because there is no urgency in the public voice. Nevertheless we regard it as most unfortunate to all other great questions, and chiefly to that than which there is none greater, the improvement of our jurisprudence, if the Government shall feel itself under the necessity of bringing forward any considerable measure of Parliamentary Reform, because we look forward to the natural consequence of such a movement, that the Session will be devoted to party wrangles within doors, and agitation, barren of good if not fruitful of ill, without,—and this notwithstanding the lull we have spoken of; for well we know how easy it is to raise a storm if the rulers are minded to ask a wind of the cunning man. Our only hope is that they may have the virtue and wisdom to abstain from such a course,—to ask no wind,—to prefer consulting and acting in the continued calm. It becomes our duty in these circum-

¹ It is always asserted that he never used the vile and un-English word; some even deny that he ever meant the thing. Possibly he said enough to make an exaggerated report of his opinion inevitable.

stances first to remove certain erroneous impressions which prevail of the connexion between Law Amendment and Parliamentary Reform; and then to note the improvements of our legal system which bear directly upon the reform of the Legislature.

1. We begin by admitting, fully and willingly, that with some material defects, the measure of 1832 has been the source of important benefits to the country. Indeed to silence those who would deny this, and especially its most formidable adversaries, they who see in it only peril to the peace of the country and the stability of our political system, we need but name the "*Tenth of April, 1848.*" Had the Bill been thrown out, as it very nearly was in 1832, and as we verily believe it might have been without a revolution, the crisis of 1848 would, we feel well assured, have passed without any change in England; but a severe or most pernicious struggle would most certainly have been the result; and from the immediate injury, as well as from the subsequent civil dissensions embroiling the community in all its classes for long years, the Reform Bill saved us. But here ends our admission of its merits. It has far more pacified the people than it has improved the Parliament. The great extension of the suffrage everywhere, and the enfranchisement of so many towns, has failed to place in the Senate any considerable number of eminent men. There have been excluded a good many men and of a more valuable description than have been admitted. The debates have not generally commanded the public respect. The excess of loquacity has made the transaction of any business difficult. The balance of party numbers has made a very strong Government impossible. Nor can any assertion be more groundless than their's who hold up the catalogue of legislative improvements which the last twenty years have witnessed, as the titles of Parliamentary Reform to the gratitude of the country. On this important part of the subject we must enter into some detail.

Let us begin with dismissing from the catalogue those measures which were not only favourably received, but actually passed by the unreformed House of Commons. We

might even state the Reform Bill itself, which was not only passed by the Commons elected in 1831 after the cry of Reform had been raised, but was passed through all save its last stage by their predecessors chosen in 1830. The new system of Bankruptcy Procedure was passed and with very little opposition, before 1832. By that and by the subsequent Acts of 1832, all before the Reformed Parliament, a great amount of patronage was taken from the Crown. The Act of 1832 abolished thirteen great sinecure places, one of them 8,000*l.* or 9,000*l.* a year. The Act of 1831 abolished seventy places of 600*l.* each; and though it substituted six in their stead, these could only be given to a few men eminent in the profession, whereas the seventy could be given, and were given, to young men long before they had any practice, and had the additional advantage of not interfering with, but assisting their advancement at the Bar. Every thing that has been gained for toleration and religious liberty was granted by the unreformed Parliament of 1828 and 1829. The steps taken since 1832 upon that great question, have been, though very inconsiderable, yet in a retrograde direction.

It is next to be remarked that of the improvements in our jurisprudence which have been made since 1832, there are scarce any that can be ascribed to the Reformed—hardly, we might even say, one that must not have been adopted by the unreformed—Parliament. The Bills of 1833 for abolishing real actions, amending the statutes of limitation, and making salutary changes in procedure, were brought in upon the recommendation of Commissioners appointed in compliance with an address of the unreformed Commons, were carried through the Lords by a Chancellor and an ex-Chancellor, and were adopted without an observation by the other House. In truth, almost all the Law Reforms have been brought forward in the Lords and passed in the Commons without opposition, almost without debate; but not a few sent down by the Lords have been stopt, either altogether or for a Session, by the Reformed Commons. The Commutation of Tithes, and the Municipal Corporation Act, are literally the only legal reforms of the least importance which have originated in the Lower House. And though nothing can

be more unfounded¹ than the boast lately made by Lord J. Russell, of the "much greater number of important measures obtained since 1833 than in any other twenty years," inasmuch as far more important measures were obtained in the five years immediately preceding, it is nearly certain that the measures of the latter period would have passed without the Parliamentary Reform.

2. It is no part of our intention to enter into any discussion of Parliamentary Reform, because political questions form no part of this Journal's province. We have sanguine hopes that the plan which may be brought forward by the Government (if they shall deem it necessary to proceed on the subject in the ensuing Session) will be pointed to the improvement of the representative rather than the enlargement of the constituent body, or at least only to such an extension of the franchise as will increase the number of members entitled to respect for their capacity, their information, and their good conduct. But as the great evil of the times in regard to the Parliament, is the corruption prevailing among the electors, it seems absolutely necessary to check it, and, if possible, to secure its extirpation. The last general election, and the subsequent inquiries of committees and commissions, show that in many boroughs the habit has become deep-rooted of regarding a vote as property, from which the owner is entitled to derive profit by selling it for money or money's worth. The law declares it to be a public trust, and forbids the sale of it absolutely, requiring an oath to be taken that nothing has been received or promised for it. The voter without hesitation breaks the law, and without scruple takes the oath. The question is—How shall this great abuse, this scandalous contempt of both law and conscience, be prevented?

Several plans have been propounded, of which the principal

¹ Perhaps the other assertion, made at the same time, is still more unfounded, that there was no free press in Scotland forty years ago, the "Edinburgh Review" having been established in 1802, and some newspapers a few years later, which carried liberty of speech to the pitch of licentiousness, as, indeed, others had done early in the war of the French Revolution.

are,—increasing the number of voters, taking the votes in secret, augmenting the penalty of bribery.

It is supposed that if the voters were more numerous, no one would deem the purchase of them possible, and so no one would attempt to bribe. But this notion proceeds upon a manifest fallacy. Bribery is practised, not on the whole body of voters, but on certain parts of it. The corruption may extend a great deal further no doubt, because the number of votes to be bought varies with the events of the canvass. But as in every borough, great or small, there is a proportion of venal electors, it is amongst them that the vile traffic begins, and when there are no hopes of obtaining a majority without gaining others of a better class, and at a higher price, the corruption is extended to them. When we say it is contagious, we do not merely use a figure of speech. Suppose in any place that the freemen, as is often asserted, are the only corruptible class, that is to say, the only class among whom in most elections bribery is known, if they were suddenly disfranchised, it is highly probable that the constituency would be purified. The knowledge that bribery is practised among them directs the attention of the others to the sale of their votes as a means of relieving themselves when in difficulties, and thus evil example produces its accustomed effect. But it is absurd to imagine that a constituency of ten thousand can be exempt from bribery. It depends upon the balance of parties whether it shall be practised or not. If in a small borough of four hundred voters, there is a powerful family or other interest commanding above three hundred, no one will attempt an opposition by purchasing a portion of the remaining votes, and then seducing part of the majority from their allegiance. If, on the other hand, there is a great town with five thousand electors, and parties run near, the purchase of enough to turn the balance will be resorted to; and the same argument applies to a town of twenty thousand. The greatest extension of the suffrage, therefore, would afford no security. Indeed, the lowest classes being undoubtedly the most exposed to corruption, an increase rather than a diminution of the evil would be the inevitable consequence of giving them the franchise.

The other expedient chiefly relied upon is the manner of

voting ; either the ballot, or the signing lists delivered at the voter's residence. As regards the present question, these two expedients are one and the same ; for they can only be expected to operate by concealing the vote given, which the one does much more effectually than the other. But both are liable to the fatal objection, that the canvasser and the voter would only be driven to the resource of making the payment of the promised money depend upon the result of the election ; and then every man who sold his vote for a promised reward would be converted into an active agent, interested in the promiser's success, and an agent for corrupting others by the like promises. It is an almost equally fatal objection, that all possibility of punishment for the offence would be at an end.

The only remedy that remains is the increased severity of the penal law. The mere defeat of a petitioner, or unseating of a member, will not suffice. The desire of a seat makes them ready to run this risk. Nor can much good be expected from the course taken by many committees, of holding parties answerable for the acts of those who were not their agents in the bribery. No doubt if a candidate gives 1500*l.* or 2000*l.* to a general agent whom he forbids to use it for paying any but legal expenses, when he must know that these cannot exceed 200*l.* or 300*l.*, he is most justly held to have bribed by his agent. But the committees have gone very much further, and unseated members merely because general agents had bribed. This evinces a laudable indignation against the evil, but not a wise view of the remedy. Would it not be a fit course to make all who receive and all who offer bribes punishable with imprisonment and hard labour,—in a word, with the treadmill,—like persons convicted of infamous offences ? Not only would no candidate expose himself to such a hazard, but no agent, no electioneering attorney, no publican, would venture upon a course which might lead to utter ruin. The common, and in most cases the well-grounded, objection to severe punishment, that it goes against the public feeling, and that witnesses will not give testimony, and juries will not convict, can have no application here. The feeling among the re-

spectable classes of society is exceedingly strong against bribery and perjury. If there were any doubts of a common jury, a special jury might be preferred, and would be just as willing to convict as the Crown or the party to prosecute. The very thing which has been blamed in the conduct of election committees,—their disposition to go all lengths against corruption,—shows how safely we may trust special juries on this subject.

It appears to us that this would be a great amendment of the law, and that it is the Parliamentary Reform most wanted in the present times.

Another Reform has been of late much discussed, that of the process of Legislation. On this we have often expressed a decided opinion, both as regards the preparation and passing of Public Bills, and still more as to the whole Private Bill procedure. The statement lately made by Lord Brougham, and his account of the Duke of Wellington's plan, both in the Law Amendment Society, and in the House of Lords, is adverted to elsewhere in this Number. An objection has been taken to that plan on the supposition, perhaps too well founded, of no little corruption prevailing among the members themselves, who certainly have sometimes shown a feeble disposition to check jobbery at least, whatever they may have shown as to plain, undisguised bribery. But it seems quite impossible that a committee on which five Peers sat could lend itself to any sinister practices in favour of parties represented by the seven Commoners. We believe that the suspicion, though not groundless, is a good deal exaggerated; and are certain that the apprehended danger would be prevented by the composition of the tribunal.

It is impossible to close this discussion without once more adverting to the necessity of a Public Prosecutor. The establishment of such an office, with the requisite amendment of the Criminal Law, would effectually extirpate the evil so justly complained of. Next to the appointment of a Minister of Justice¹, this seems the most pressing among the measures of Law Amendment at the present time.

¹ Regarding this much wanted functionary, it should be kept in mind that now the Lord Chancellor really has full time for exercising all the duties, or

ART. V.—TREATISE ON THE CONTRACT OF PARTNERSHIP BY POTHIER.¹SIXTH CHAPTER.²*Of the Debts of Partnerships; and the Liability of each of the Partners for them.*

WITH respect to this, it is necessary to distinguish between partnerships in trade and those which are not partnerships in trade; and amongst partnerships in trade, between those which are called partnerships *en nom collectif* and those which are called partnerships *en commandite* and partnerships termed *anonymes*.

§ 1. *Of the Debts of Partnerships EN NOM COLLECTIF.*

96. In partnerships of commerce *en nom collectif* each of the partners is bound (*solidairement*) *in solido*, that is to say, jointly and severally by the debts of the partnership. (Ordonnance of 1673, tit. iv. art. 7.)

This provision of the Ordonnance is an exception to the general principle of Law, according to which, when several persons contract an obligation together, each is considered to have contracted it only with respect to his own share, unless it has been expressly declared that the obligation is joint and

almost all, of minister of justice. There is not one of his judicial duties out of Parliament which the Lords Justices may not perform, even those in lunacy. Term is now about to commence, and for three months he will have nothing whatever to do of necessity, supposing Parliament to meet at the usual time,—at least nothing which, by sitting a day or at most two days in a week, he may not easily get through. If he were to sit regularly in one Appeal Court while the Lords Justices were holding another, it seems inevitable that there would be no work for all three to do, and that the Lords Justices must act as Vice-Chancellors.

¹ Panzirol, de Clar. Leg. Interpr. p. 144.

² For Chap. I. see 17 L. R. p. 278.; Chap. II. 18 L. R. p. 157.; Chap. III. IV. and V. p. 277.

³ The partners *en nom collectif*, mentioned in the act of partnership, are jointly and severally liable for all the engagements of the partnership, although only one of the partners has signed, provided it be (*sous la raison sociale*) in the name of the firm. Comm. Cod. of France, 22. See Pothier on Obligations, n. 83. Our law is essentially the same as the French. See *anté*, 90. note, and Troplong, Contract de Société, 297.

several; l. ii. § 2. *de Duobus Reis.* (Dig. lib. xlv. tit. 2. l. 11. § 2.)

That exception is founded upon the favour shown to commerce, in order that traders in partnership might obtain more credit. It is founded also upon this according to the principles of our French law differing in (this respect from those of the Roman law in the law 4. *ff. De Exerc. Act.*), that partners in trade are considered to be agents and managers for each other of the business of the partnership. But an agent or manager who enters into a contract binds all his employers, jointly and severally; l. 1. § fin. et l. 2. *ff. De Exerc. act.* l. 13. § 2. *ff. De Inst. Act.*

With regard to the heirs of a partner, they are collectively liable for the whole of the debts of the partnership as representing the deceased who was liable for the whole of them; but each of them is only liable to the extent of the share that he is entitled to as heir of the deceased.

97. In order that a debt may be considered a partnership debt, so as to bind each of the partners jointly and severally, it is necessary that two things should concur; first, that it should have been contracted by some one who had the power of binding all the partners; secondly, that it should have been contracted in the name of the partnership.

FIRST CONDITION.

98. In order that a debt may be a partnership debt, binding upon all the partners, it is necessary that he who has contracted it should have the power of binding all the partners.

For one of the partners to have this power, it is necessary that his copartners should have given to him, either expressly or by implication, the power of managing the affairs of the partnership, or that the person who has contracted with him, had grounds for believing that he had that power. If this be not the case, the debt contracted by him, although in the name and for the affairs of the partnership, does not bind the other partners, except in so far as the partnership has profited by it.

In order that the public might know whether a partner has

that right, the Ordonnance has wisely prescribed the registration (*au greffe*) at the Registry, and the inscription in a public place of an extract of contracts of partnership, which extract should contain those clauses of the contract of partnership which concern the public, as we have seen, *suprà*, ch. 4.

If that provision were observed, it would be easy for those who contract with a person who professes to be in partnership with others to know, by consulting this extract, whether he had or had not the power of managing the partnership, and of binding his copartners; and those who should have contracted with a person who had not this power would be to blame for not having informed themselves on the subject.

That provision of the Ordonnance having fallen into disuse, as we have before seen, how can I know that a partner with whom I contract has the power of managing the affairs of the partnership? And when am I to be considered to have grounds for believing that he had that power?

When the partner with whom I have contracted was already in the habit of entering into contracts in the name of the partnership in the presence and with the knowledge of his copartners, it is clear in such case that this would give me a just ground for believing that he had power to manage the affairs of the partnership. Therefore the debt which he contracts with me binds his partners, even if he had been formally excluded from the management by a clause in the partnership contract; for if they are not bound, in such case, by virtue of a power given to him to enter into contracts for the partnership, they are bound *ex dolosa sua dissimulatione*; or, even without accusing them of fraud, it may be said, that by allowing him to contract in the name of the partnership in their presence and with their knowledge, they ought to be presumed to have given to him tacitly the power which they had at first refused to him by the contract of partnership.

There is more difficulty in the case where a partner, who has contracted in the name of the partnership, was not already in the habit of doing so, and was effectually excluded by the contract of partnership from the power of managing the affairs of the partnership.

On one side it may be argued, against the person who has contracted with him, that he ought to have informed himself whether that partner with whom he contracted had power of managing the affairs of the partnership. *Qui cum aliquo contrahit vel est, vel debet esse non ignarus conditionis ejus cum quo contrahit*; l. 19. ff. *De Reg. Jur.* (Dig. lib. l. tit. 17. l. 19.) On the other side it may be argued, that the Ordonnance of 1673, in saying that "all partners shall be bound by the debts of the partnership, even if there has been a signature of only one, provided the signature be for the company," since it does not draw any distinction as to whether such one has or has not the power of management, appears to suppose that each of the partners ought to be presumed to have that power, whilst the contrary is not known. The reason is, that it being the practice in trading partnerships for the partners reciprocally to give each other power to contract and to do the business of the partnership for each other, he who has contracted with one of the partners has just grounds for believing that such partner had that power, when the clause of the partnership contract, which took it away, was not known either to him or to the public.

That being an extraordinary clause, and one which concerns the public, the partners ought to make it public, according to the requirement of the Ordonnance; and in default of having done so, it ought to be of no effect with regard to third parties, and the firm ought to be bound by contracts entered into by their partner, although he was deprived of the management by a clause of the partnership, and in the same manner as if he had had the power of management, the clause which took away from him this power being of no effect with regard to third parties, for the reasons above given.

Not only has one of the partners the power in contracting to bind all his copartners jointly and severally, but a factor or (*instituteur*) agent who has been entrusted by all the partners with the management of the affairs of the partnership, although he is not a partner, has in like manner the power of binding all his employers, jointly and severally, according to the principles which I have established in my

“Treatise on Obligations,” Part. II. chap. vi. sect. 8. art. 2.

Second Condition.

100. Whatever power one of the partners may have to bind the others by a debt which he has contracted, it is necessary that it should be contracted in the name of the partnership.

The Ordonnance of 1673, tit. 4. art. 7., declares when it ought to be considered as contracted in the name of the partnership. It is, says the Ordonnance, when the partner adds to his signature, that he signs “for he company, and not otherwise.”

101. When the debt has been contracted in the name of the partnership, it binds all the partners, even when the partnership has derived no benefit therefrom. For example, if one of the partners has borrowed a sum in the name of the partnership, although he has employed it in his own private affairs, and not in those of the firm, the creditor who has his note signed “and company,” can demand its payment from all the partners; for the creditor could not foresee how he would employ the sum lent to him for the partnership: the other partners must blame themselves for having taken a faithless partner, in the same manner as, in a like case, an employer ought to blame himself for having committed the management of his affairs to a faithless person; l. 1. § 9. *ff. De Exercit. Act.* (Dig. lib. xiv. tit. 1. l. 1. § 9.)

But if, by the nature of the contract which I have entered into with another person who was in partnership in trade with others, it appears that the object of the contract did not concern the affairs of the partnership; if, for instance, the contract was a bargain for works to be done to a house which that person possessed unconnected with the partnership; although he may have signed the bargain “and company,” the debt will not, on that account, be considered a debt of the partnership, since, by its object, it appears that it did not concern the affairs of the partnership.

On the contrary, when one of the partners does not appear to have contracted in the name of the partnership, but in his own name alone, although the partnership has derived a

profit from the contract—for instance, if, having borrowed a sum of money in his own name only, for his own affairs, he employs it in the affairs of the partnership,—the person who contracted with that partner will not, on account thereof, have an action against the other partners; because, according to the principles of law, a creditor only has an action against him with whom he has contracted, and not against those who have profited by the contract; L. 15. *Cod. Si certum petatur et passim*: the creditor, with regard to the other partners, has only the means of seizing in their hands what they owe to his debtor, on account of that transaction.

§ II. *Of the Debts of Partnerships en commandite, and of anonymous Partnerships.*

102. Since in partnerships *en commandite*, the principal partner, and in anonymous partnerships the known partner, alone

¹⁰² In a partnership *en commandite*, when there are several partners jointly and severally responsible by name, whether all manage together, or one or more manage for all, the partnership is at the same time a partnership *en nom collectif* with respect to them, and a partnership *en commandite* with respect to those who are merely holders of funds or shareholders. Comm. Cod. of France, 24.

The name of a partner *en commandite* cannot form part of the style of the firm. Ib. 25.

The partner *en commandite* is only liable for losses to the amount of the funds which he has contributed, or ought to contribute, to the partnership. Ib. 26.

The partner *en commandite* can do no act of management, nor be employed in the business of the partnership, even under a power of attorney. Ib. 27.

In case of contravention of the prohibition mentioned in the preceding article, the partner *en commandite* is responsible, jointly and severally, with the partners *en nom collectif*, for all the debts and liabilities of the partnership. Ib. 28.

An anonymous partnership is indicated by the designation of the object of its enterprise. Ib. 30.

It is managed by temporary directors, who are revocable, and are either partners or not partners, with or without salaries. Ib. 31.

The directors are only liable for the execution of the powers confided to them. They do not contract by reason of their management any personal or joint and several obligation with relation to the engagements of the partnership. Ib. 32.

The partners are only liable for losses to the amount of their interest in the partnership. Ib. 33.

With regard to partnerships *en commandite* it will be observed that the partners whose names appear to the world are, like partners *en nom collectif*, jointly and severally liable for all the debts, while the partners *en commandite* whose names do not appear, if they comply with the provisions of the code, as to registra-

makes, and each in his own name the contracts of the partnership, it follows that he renders himself alone liable, and

tion and non-interference with the management of the affairs of the partnership, will only be liable to the extent of their capital. This species of partnership does not exist in England, because it is here a maxim of the law that all persons entitled to a share in the profits of a partnership, even dormant or concealed partners, are, as regards third parties, notwithstanding any stipulations among themselves, liable *in solido* for all the debts of the partnership. (See *Blundell v. Winsor*, 8 Sim. 601.; *Walburn v. Ingilby*, 1 My. & K. 61. 76.; *Stor. Partn.* 254.) So likewise if a person advance money to a firm at a rate of interest varying with the profits of the concern, he will be liable as a partner. Partnerships of this kind exist in all parts of the Continent of Europe, and have been adopted in many of the States of North America; and it appears to be the opinion of mercantile men, and of lawyers in those countries, that they have greatly contributed to commercial prosperity, and towards bringing capital, which would otherwise have remained dormant, into active and useful circulation.

The introduction of partnerships *en commandite* into this country has been recommended by many persons whose opinions are entitled to great consideration; and as it is believed that here as well as elsewhere they would promote the prosperity of small capitalists, and especially of the working classes, it is to be hoped that the commission now sitting for the purpose of taking into consideration the mercantile laws of England, Scotland, and Ireland, with a view to their assimilation, will not pass over without notice a subject of such deep importance. The principle of limited liability, as in partnerships *en commandite*, has been long since recognised and adopted in this country, where Acts of Parliament or Charters have constituted companies for *public* undertakings, such as for railways, gas, or waterworks, docks, &c. The Irish Anonymous Partnership Act (21 & 22 Geo. 3. c. 46.), passed so far back as the year 1781-2, adopts the principle of limited liability, but as it interferes too much with what ought to be left to the discretion of the parties, its success has not been very encouraging.

One of the objections which might formerly have been raised to partnerships *en commandite* was, that they were merely the means of obtaining a rate of interest varying with the profits of the concern, and were therefore within the mischief of usury; but as the laws against usury (except where land forms part of the security) have been repealed, this objection can now have no weight.

Another objection is, that these kinds of partnership would lead to undue speculation. To this we may answer that in *private* undertakings the owners of capital are in general the best judges as to whether they would or would not be productive, and that the Legislature which confers the privilege of limited liability upon companies formed for carrying out undertakings of a *public* character, might depend upon individuals exercising ordinary prudence in their own affairs.

Another objection is, that it is not right that the partner with limited liability should participate in the profits and throw the losses upon innocent parties. There is, however, no weight in this objection, for if a partner *en commandite*, contracts with third parties (as he does in all cases), that he will be liable only to the extent of his capital in the concern, those parties who, after full notice,

that the partners *en commandite*, as well as the unknown partners, are not, according to the principles established *suprà*, n. 101., liable for the debts of the partnership to the creditors with whom the principal or known partner has contracted. They are only liable for them to their principal or known partner who has contracted them; they ought to acquit him from them according to the share which each has in the partnership; that is to say, the anonymous partner indefinitely, and the partner *en commandite*, only to the amount of the capital which he has put into the partnership.

§ III. *Of the Debts of Partnerships not Partnerships in Trade.*

103. The Ordonnance of 1673 having been promulgated for the purposes of commerce, which appears to be the object of all its provisions, it can no longer be doubted that its title "*Of Partnerships*" is applicable only to partnerships in trade: for this reason, when it is said "that partners are bound, jointly and severally, by the debts of the partnership," it holds good with respect to these partnerships only. That joint and several liability being an exception from the common law, founded upon a reason peculiar to commercial partnerships (*suprà*, n. 96.) ought not to be extended to others; and when

deal with the partnership, have no natural or equitable right to more than what they have contracted for.

That creditors are better circumstanced when part of the capital to carry on a business is subscribed by partners *en commandite*, than when it is borrowed by a firm, is clear. Thus, if a firm carries on business with a capital of 20,000*l.*, 10,000*l.* of which is borrowed, in the event of ill success the lender, after obtaining perhaps a far higher rate of interest than the average rate of profits, either obtains a preference over the other creditors, or proves as a creditor for what remains unpaid of the 10,000*l.*, whereas a partner *en commandite* would only be entitled to a share of the profits, if there were any, and would be liable to the extent of his 10,000*l.* embarked in the concern to its creditors.

The principal opponents of partnerships with limited liability will most likely be found amongst the large capitalists, who perhaps naturally fear that a combination of small capitalists, by bringing dormant capital into active competition with their own, would thereby diminish their profits.

¹⁰¹ In partnerships other than those for commerce the partners are not bound jointly and severally by partnership debts, and one of the partners cannot bind the others, unless they have given him that power. Civ. Cod. of France, 1862.

two partners (who are not partners in trade) enter into contracts, although for the affairs of their partnership they do not bind themselves jointly and severally towards the creditor, but each for his share only, unless a joint and several liability be expressed.

104. Is that for an equal share, or for the share each has in the partnership? The answer must be, in the absence of any expressed intention, that it is for an equal share; the creditor with whom they have contracted not being bound to know what share they each have in their partnership. For example, suppose two neighbours at Paris agree to buy at their common cost a carriage and horses, and to keep the equipage at their common cost, for their use in Paris: they contract together a partnership in that equipage, and it is a partnership *unius rei*, not for the purposes of trade. If, during that partnership, they make a bargain with a person who sells them a certain quantity of hay for a certain price, which they each bind themselves to pay within a certain period, although they are partners, and the debt which they

¹⁰⁴ Partners are bound towards the creditor with whom they have contracted, each in an equal sum and share, although the share of one of them in the partnership should be less, if the act have not specially confined the obligation of the latter to the footing of the latter share. Civ. Cod. of France, 1863. A stipulation, that the obligation is contracted on account of the partnership, binds only the partner contracting, and not the others, unless the latter have given him authority, or the thing have turned to the profit of the partnership. *Ib.* 18, 64. See 2 Stor. Partn. 257. According to our law, it seems that partners, although not in trade, would be liable (*in solido*) for the debts of the partnership, provided they were properly contracted, and within the scope of the business of the partnership, according to the rules before laid down. But it must be remembered that a partner in a non-trading partnership would frequently be held to have no power to bind his copartners, when he would be able so to do in a partnership in trade. For instance, one of several persons jointly interested in a farm has no power to bind the others by drawing or accepting bills, because it is not necessary for the purposes of carrying on the farming business, that bills should be drawn or accepted; per *Littledale*, J. 10 B. & Cres. 139.; and it would be the same as to a mining concern. *Dickinson v. Valpy*, 10 B. & Cres. 128; *Mullet v. Huchison*, 7 B. & Cres. 639.; *Thicknesse v. Bromilow*, 2 Crompt. & Jerv. 435.; *Greenslade v. Dower*, 7 Barn. & Cres. 635.; Stor. Partn. 190.

have contracted for the price of the hay which is to serve for the keep of the horses of their common equipage is a debt contracted for the affairs of the partnership; nevertheless their partnership, not being a commercial partnership, they will only owe each a moiety of the price of the hay to the seller, unless by the bargain a joint and several liability was expressed.

But even if, by their contract of partnership, they should have agreed that one of the two, who used the equipage less frequently than the other, should only have a third share in it, each of them would, nevertheless, be liable for the moiety of the price of the hay towards the seller, who has sold it to both, without prejudice to the partner who has only a third share, making the other account to him for what he has paid more than his third.

105. When the debt has been contracted by one of the partners only, he alone is liable to the creditor, without prejudice to his making his partner account to him for it.

This will be the case, even when by the contract he should have expressly stated that he contracted as well in his own as in the name of his partner: the provision of the Ordinance of 1673, which says, "that a partner, in that case, binds his copartners," is applicable only to commercial partnerships. If, nevertheless, he was justified, or his partner had effectually given him power, or the debt had turned to the profit of the partnership, the other partner would be liable to the creditor, according to his share in the partnership.

When one of the partners has contracted in his own name alone, it is clear, in such case, that he alone is liable to the creditor with whom he has contracted, in the same way as we have seen with regard to commercial partnerships (*suprà*, n. 101.) without prejudice to his obtaining an indemnity for that debt from his partners according to the share which they ought to bear of it, when it has turned to the profit of the partnership.

106. With regard to universal partnerships, it must in like manner be decided that the partners not being commercial

partners, when they contract together, render themselves liable towards the creditor with whom they contract together, each for his share only, as we have seen with regard to particular partnerships not being commercial partnerships. But in these universal partnerships, each of the partners being unable to contract for his own profit, is readily presumed, when he contracts, although alone, to contract in the name of the partnership; and he consequently binds each of his partners, according to their respective shares in the partnership.

With regard to the manner in which each of the partners is bound in that kind of universal partnerships which takes place between husband and wife, and in that which the survivor of two persons united by marriage contracts in default of an inventory, see what is said in my introduction to the "Title of Community," chap. 7., and in that to the "Title of Partnership," sect. 1. § 7. and sect. 2. § 6.

ART. VI.—THE STATUTE LAW COMMISSION: ITS PROGRESS AND PROSPECTS.

WE have before us, in a somewhat imperfect form¹ (for the regular parliamentary publication has not, for some unaccountable cause, yet appeared,) the first instalment of the labours of the Statute Law Commission. It is to be regretted that the authentic edition has been retarded, as it is of the greatest importance, for the reasons to which we shall have occasion to advert, that the subject should undergo mature and complete discussion.

¹ We are indebted to the "Legal Examiner" for a portion, and to the favour of one of the Commissioners for another portion, of the papers of the Commission, excepting what were published in our last No., 18 L. R. p. 493.

Not undervaluing the Chancellor's spirit in undertaking this enterprise, nor the mass of valuable suggestion which the papers as a whole contain, we cannot forbear to remark that the total result tends to show that this Commission is in a peculiar degree liable to failure from three causes,—

I. WANT OF PURPOSE.

II. WANT OF METHOD.

III. WANT OF MEANS.

Causes of failure so potent, and so certain in their effects, if suffered to continue in operation, that the utmost energy must be exerted to avert the consequences, especially as it is to these causes that every previous effort of the like sort in this country has owed its miscarriage.

We shall address ourselves to the above points in order, and with some particularity, on account of the very great importance of the considerations involved, and of the necessity of urging the Chancellor to avail himself at once of the breathing-time which we have between the present moment and the meeting of Parliament.

That we are right in attributing to this effort

I. WANT OF PURPOSE.

is apparent from the most cursory perusal of the papers, particularly of that by Mr. Bellenden Ker, which, as it is the production of that Commissioner who is charged with the direction and superintendence of the work, may be considered to contain the scheme and scope of the policy and projects of the Commission.

It will be observed that the first announcement was "the Consolidation of the Statute Law," which was to be brought about by several processes: *i. e.* by making a list of all statutes, repealed or obsolete; by expurgating the Statute Book of such statutes; by digesting statutes, or bodies of statutes; and by so dividing in future the different branches of Statute Law—the permanent, transitory, and repeal portions—as to provide against the recurrence of similar confusion.

These things have been hastily taken up, and as hastily

put down. Instead of working out these practical problems in an explicit manner, or, indeed, of indicating an intention to do so, the Commissioners have raised for solution by the Chancellor the following questions (but by no means in the distinct form in which we present them):—

1. Whether the effort should be extended to all kinds of Law.

2. Whether it should be confined to the Statute Law, excluding the Common Law.

3. Whether it should be confined to some branches of the Statute Law, excluding other branches of the Statute Law as well as the Common Law.

4. Whether the work should be done at once or piecemeal.

5. Whether the Statute Book should be expurgated of all statutes which are repealed or become obsolete, and be so declared by a single statute.

6. Whether the work should assume the form of a statutory enactment or of a digest, or both.

7. Whether the Statutes should be written in any and what form.

8. Whether the work should be done in this or that order.

9. Whether the Commissioners should begin at once and before they have come to settled conclusions, to revise Bills in Parliament as they proceed, thus learning and exemplifying as they go on, and gradually introducing fresh and fresh improvements.

These and a great variety of general questions are left to be determined by the Chancellor before the Commission can practically go to work.

The papers by Mr. Coode furnish a valuable exposition of the principles to be acted upon in the operations of such a Commission, and the means of coming to some agreement, and also of enabling the Chancellor hereafter to judge whether the Commissioners are proceeding in a right direction; but as yet there are no evidences of agreement, but the reverse, nor, indeed, evidences of an approach to it.

To assist in this matter, which is obviously an indispensable preliminary to successful action, we offer these remarks.

The purpose, as we conceive it to be, is—

1st. To ascertain the state of the Law.

2ndly. To reduce it into a form which shall adapt it to its

uses :—

1. To the public at large.
2. To the profession.
3. To the public functionaries.
4. To the judges.
5. To the legislature.

It is referred to the Commission to execute this work,—to show specifically not only what in generals it is desirable to do, but also, in particulars, the ways and means of doing it. It is fit and necessary to have the principles of action before us; it is as necessary to have in view the appropriate means of realising those principles in practice; and we think, also, that it would be useful to the Chancellor to have presented to him for his information and guidance examples of what has been done.

The Chancellor who has confided to these gentlemen the task of collecting materials for his judgment, will find that he has yet to seek those materials. A simple chronological statement, fairly and dispassionately done, of the works of former labourers, would have enabled the Chancellor to act for himself; but if the propositions suggested by former writers, and exemplified by illustrations, were propounded systematically according to the nature of the matter, his task would have been much more easy. He would have had simply to select the best method out of those produced, and he would have been enabled to see the various services that have to be performed, and how far such services would contribute to the result.

The questions put by the Commissioners are mostly put alternatively, as if the adoption of one or some would preclude the adoption of the rest; or, as if the adoption of one should postpone the adoption of others. We would suggest the consideration whether the doubts raised by the Commissioners do not show that all the operations should be performed simultaneously or nearly so, but by different hands.

The Chancellor should observe how far such varying sug-

gestions arise from men with a field of work beyond their strength, and labouring under the impatience of labours that do not coincide with their tastes,—a point to which we shall have occasion to advert farther on.

It is obvious that a great work well understood in its processes as well as in its end, may be performed by few men, if distributed over a sufficient space of time, and if the parts were properly allotted among the workers.

Without a full recognition of the objects, and of the means, and of the processes by which those means are to be applied to the accomplishment of the objects, nothing can be done successfully, and the attempts will be characterised by a degree of vacillation which these papers betray.

The collection of the material, the statement of the matter, the criticism of the statement, and the correction and adoption of the final document, might each and all be performed by the same person taking different portions.

But then, Purpose must reign through every part of the work, in the whole design and in all its parts. The principles of each operation must be distinctly worked out in appropriate forms, and the application of those principles and those forms illustrated by suitable instructions.

This brings us to another point of our observations.

II. WANT OF METHOD.

There can be no method where there is no plan. When a man builds a house he usually considers, first, the End: that is, all that he would desire to have in the final result. Secondly, he wisely considers the Means,—what resources he can rely upon in executing the work, and also the cost of maintaining the structure when he has the fulfilment or result.

In codifying or consolidating we must always have regard to the end of the work, and to the whole of it,—a truth no less applicable in ordinary legislation, but which we are compelled to depart from somewhat, under the pressure of present exigencies.

The task now under consideration is of the former sort ;

and the Lord Chancellor, the chief Minister of State in matters of Law and Justice, has to regard the whole, and to give to his work the impress of a mind profoundly versed in the principles of Jurisprudence, in Juridical Administration, and in Legal and Official Administration. No great work was ever accomplished by such a tentative process as is contemplated, it would seem, by the Commissioners, proceeding bit by bit empirically.

All, or most great objects originate by a single effort, by a single paroxysm, or by a single orgasm, to be carried out, indeed, by many agencies or influences suitably organised, the action of which may often be occasional or partial: but, however occasional or partial, if founded on a true principle, and wisely directed, tending to the complete fulfilment of the object.

The impulsive genius of one man, the philosophic sagacity of another, or the instinctive intuition of a third, will give this generating purpose, and a strong will, reliant on its own position, will impel and compel its realisation by well-selected agencies of each suitable kind.

The papers of Mr. Coode do very ably indicate the idea; but its exposition is so copious and comprehensive, that it needs to be reduced to the simpler form of practical propositions and instructions; and the order and course of proceeding need to be worked distinctly in the manner of a programme; showing not only what the thing is, but by what processes it is to be worked out, and by what agencies, and what is the probable period of the completion of each stage of the work,—and, indeed, of the whole undertaking, with an estimate of the monies which will be required to remunerate the suitable agencies.

We look in vain in these papers for a whole idea, or for a plan of action. We conceive that the chief Commissioner should have laid down such a plan of action; and if he considered that any one plan could not be pronounced upon decisively, it was his duty to propound alternative plans of action, so that, on inspection, the Chancellor should have been able to say, I prefer this—work it out.

On the contrary, not only is there no plan of action — or

such as it is has been shifted several times,—but three of the junior Commissioners seem, as decorously as they could, to have declined to take the no-plan propounded by the chief Commissioner.

To no plan of action may be added a want of order in the operations. A body of persons may get on tolerably if the body be systematic, constant, and prompt in its movements, though it be not conscious of the ulterior steps or the possible calls upon it—for the errors of one day may be cured by the experience and accuracy of the next (a course not to be recommended for its economy or its efficiency). There is no appearance of system or of official intercourse of any sort. The work, it is understood, is executed apart, at the chambers of the Commissioners, without concert, and the meetings, if any, are very rare.

We conceive that there should be a plan—that that plan should cover the whole field of work—that the work should be well distributed among the workers—that it should be well set out, so that inferior as well as superior persons may work thereon—that periodically there should be intercourse after the usual official or judicial mode,—and that the movements should be systematic and orderly, regular, prompt, and constant.

We may be told that this cannot be done, from —

III. WANT OF MEANS:

from want of personal means, both in kind, quantity, and quality—from want of material means—and from want of moral means.

We consider that it was part of the duty of the chief Commissioner, in stating his alternative plans, to show specifically the personal means which are required, distinguishing the personal of the highest order, of the secondary order, and of the lowest order; and that these means should have been set forth in the manner of an estimate, that the Chancellor, the Finance Minister, and Parliament might judge of the propriety of suitably reinforcing the Commission. Such a statement would have given a practical directness to the sug-

gestions of the Commissioners, and probably forced upon them considerations which they do not appear to have entertained.

To the statement of personal means should have been added a statement of material means. Of such sort would have been a Catalogue or List of Books and Parliamentary Papers treating of the subject — and the Books and Parliamentary Papers too ; — prepared forms according to the methods now in use, or suggested by previous writers, and workers in this direction ; — above all, the mechanical aids which an intelligent and skilful printer can render ; for while more errors and difficulties than are commonly known lie here, here also may be found the most abundant facilities.

With, however, all personal means, and all material means, a work of this sort cannot be successfully prosecuted without moral means.

To this subject Mr. Brickdale sensibly and earnestly refers. He quotes the opinion of, on this head, the New York Commissioners, who attributed much of their success to the moral support which they received.

If the Commission be not held in good esteem by Parliament, by the Profession, and by the Public, its labours are worthless. What is done by statesmen in all difficult cases of national concern, is to take counsel either of the distinguished men of all parties, or of some distinguished man held in esteem by all parties, to whose judgment or authority the rest of the community will be willing to defer. It is indispensable that the officers engaged in this most arduous labour should be treated, not as clerks, but as learned and able men, and their remuneration should be measured by the amount of learning and experience they must bring to the task. If difficulties are encountered, there must be the means of quickly determining those difficulties as they arise, and by such means that they shall not be liable to encounter the opposition which is usually accorded to the Chancellor, considered as a party man.

But the greatest want of means is to be found in the want of a Minister of Justice, so called and so recognised. A

Minister of Justice, having the assistance of secretaries, or other principal officers of the rank and accomplishments of the under secretaries of State, one of whom being a permanent officer, might continue from chancellor to chancellor those operations, such as this, which are of a chronic and permanent sort, and with so much of a subsidiary official staff as would insure regularity and constancy to the Chancellor's work, and enable him to acknowledge the receipt of those communications which he is continually receiving upon the matters within his cognisance.

If the Minister of Justice were so provided with suitable official means, the desultory character of the proceedings of such a commission as the Statute Law Commission would be deprived of its mischievous effect by the greater regularity of the minister's staff.

To the Minister of Justice should be assigned official quarters, that his functions may have a local habitation as well as a name.

The change which has taken place in the character and operation of the office of Lord Chancellor will admit of his taking upon himself the duties of Minister of Justice without encroaching upon the duties hitherto considered proper to the Chancellor.

Sure we are that the consolidation of the Law may well task the highest powers, demand an ample grant of the national resources, and justify a force somewhat better adapted to the purpose than the Commission now appointed.

We think the labours of the learned persons who compose this Commission might be easily and judiciously reinforced, and we are confident that in all branches of the profession, as well as among official persons, there would be found men willing and able to lend their aid to a work of such immediate practical utility and so much calculated to illustrate the country and the personages by whose agencies it may be carried into effect.

The Chancellor has the great merit of undertaking the work; and we trust that he may have the wisdom and energy so to lay the foundations of it, that although it may not fall to

his lot to witness its completion, he may yet live to see it so far advanced as to be regarded as the realiser of the idea.

Our space will not allow us to enter more fully into the means by which he might secure this result, but we would offer the following brief suggestions:—

1. To collect in the form of propositions all the suggestions yet made for the improvement of the Statute Law, together with the names of the authors or proposers.

2. To collect a sufficient number of examples of the practical adoption of each kind.

3. To collect outlines of law, of systems of law, and of particular branches, to be found in existing legislation and in books.

4. To compare those outlines with one another.

5. To seek the opinions upon these matters of those persons who have devoted themselves to the subject.

6. To frame a scheme of instructions from these materials.

7. To require the Commission to sit periodically, and, it may be in public.

8. To require the Commission to discuss *seriatim* the points propounded.

9. To require the Commission to make an enumeration of *desiderata*.

10. To require the Commission to frame a programme of operations, and if they differ to place the parts of the programme on which the difference arises in parallel.

11. To allow as of right, and indeed to require, each Commissioner to produce his suggestion, not only in the terms of a proposition, but also in a realised shape.

12. In case of difference among the Commissioners to take the opinion of other officers and gentlemen who have devoted themselves to the subject, or whose avocations are of a nature to make them conversant with it.

Other suggestions occur to us, but the above will protect both the Chancellor and the public from idleness, from one-sidedness, from jealousy, and, in one word, from miscarriage. It must be remembered that the work is truly the nation's work, not the work of the present generation, but of many—perhaps all generations to come—of the nation, and that

the wit and the powers of one individual, or of a few individuals, are manifestly unequal to the task of embracing all views, all experiences, and all phases of the subject. The Commission should be regarded as the instrument neither automatic nor autocratic, and the Public and Parliament will appreciate it the more that its action is apparent from day to day, so that as the Commission runs they (the Public and Parliament) may read. It will save the great evil of the accumulated results of investigation,—the blue books,—which bury the subject, and indefinitely postpone it.

Upon the Chancellor rests the responsibility of this work, and to him is due every assistance that the Profession can give. On the other hand, it is due from the Chancellor to the Profession, to Parliament, and the Public that he should welcome and avail himself of that assistance in every practicable way.

ART. VII.—THE REFORM OF THE ECCLESIASICAL COURTS.

No. II.

THIS subject must come before the next Session of Parliament, and, as we hope, may be settled completely and satisfactorily. In our last Number we laid before our readers some of the results of the deliberations of the committee of the Law Amendment Society.¹ We shall now complete this series of papers, which will, as a whole, we are persuaded, afford the materials, not only for the consideration, but for the adjustment of this difficult question.

COMMISSARY COURTS OF SCOTLAND.

THE most ancient form of these Courts was what was called in each diocese the Bishop's Court, and occasionally the Consistorial Court, in which the bishop took cognisance of the

¹ 18-L. R. 323—336.

moveable estate of all persons dying within his jurisdiction, retaining a certain share for his trouble.

At the Reformation in Scotland (1560), the episcopal (then Roman Catholic) jurisdiction was abolished; and in 1563, a Commissary Court was created in Edinburgh, consisting of four commissaries as judges; and sometime thereafter a commissary was appointed to each diocese. The power or jurisdiction of the former was most extensive; in consistorial causes, indeed, it was supreme; in other causes, its sentences were subject to the review of the Court of Session. Consistorial causes comprehended declarators of marriage, actions of adherence and divorce, adultery, bastardy, execution of testaments, &c. &c.

The commissaries of Edinburgh also reviewed the sentences of the local or diocesan commissaries. In addition to this privative jurisdiction, the commissaries exercised a jurisdiction commulative with that of the Court of Session and other judges, in all actions bearing even a remote similarity to consistorial actions, such as actions for tithes, for alimony to a wife, for slander, &c. &c.

The inferior or diocesan commissaries had no jurisdiction in the important causes already named, but they had jurisdiction in all the other causes mentioned, and in addition in actions of civil debt to the amount, at one time, of twenty, and from and after 1752, of forty pounds Scots. In all causes competent before them, except those connected with wills, the sheriffs had commulative jurisdiction.

At length, in 1823, an Act was passed abolishing all diocesan Commissary Courts, and transferring their jurisdiction to the sheriffs of the different counties, by which these counties became *commissariats* as well as *shires*. By a subsequent statute the actions previously privative in, *i. e.* confined to the Supreme Consistorial Court, were transferred to the Court of Session; the four abolished commissary judges as a compensation, while they lived being exclusively authorised to take all proofs on commission in consistorial cases. After their deaths, it was provided that such proofs should be taken by four of the sheriffs of Scotland appointed for the purpose. In this way the Supreme Commissary Court of Scotland was *de*

facto abolished, and the jurisdiction as to testaments or wills, which in the case of foreigners was exclusively vested in this Court, was vested in the Commissary Court of the county of Edinburgh, *i. e.* in the sheriff of this county, acting as commissary therein.

At present then, the Commissary Court of Edinburgh, in addition to the jurisdiction after mentioned vested in every inferior commissary, is vested with exclusive jurisdiction in all cases of wills or testaments, and the issuing of confirmations of probates of the personal property of persons dying abroad. The only other relic of the Supreme Commissary Court of Scotland, if it deserves the name of relic, is the duty now performed by four sheriffs of acting as commissaries in taking proofs in cases purely consistorial.

No other remark seems necessary as to this Court: the Commissary Court of Edinburgh being in precisely the same situation and vested with precisely the same jurisdiction (except in the case of persons dying abroad) as the other local Commissary Courts of Scotland.

Confining the following observations to the Inferior Commissary Courts of Scotland, the judges of which are now in all cases the sheriffs, it is to be noticed, that by the Act of 1823 already referred to, these were in effect abolished as civil judicatories and Courts of Record. One remnant only of judicial power is now enjoyed by them, *viz.* to declare the executor of a party deceased when he fails to appoint one. The mode of doing so will be noticed under Intestacy. But the Courts were retained under new divisions into shires, instead of the old ecclesiastical districts, for the purpose of registering inventories of the personal estates of persons deceased. The system of registration is as follows:—

Testacy, — The will of the deceased, if it contain a nomination of executors, as wills almost invariably do, and in all cases where there is personalty ought to do, is exhibited to the clerk of the Commissary Court of the county in which the testator died; and along with it is given in a regular stamped inventory of the various items of the deceased's personal estate, and an affidavit by one of the executors nominated in the will, to the verity of this inventory. If a con-

firmation is required, *i.e.* a power to the executors to uplift and discharge all or any of the items of the inventory, it is at once granted by a writ issued and subscribed by the clerk of Court, which, though popularly known as a confirmation (similar, it will be observed, to our probate), is technically termed a "Testament Testamentary" of the deceased; and this confirmation or writ is the warrant of or authority enabling the executors conformed to sue for, recover, and discharge the deceased's personal estate enumerated in it. In all this procedure, which is exceedingly simple, the Commissary or Judge who, it has been observed, is the sheriff of the county, does not appear; it is wholly conducted by the clerk, and may be begun and completed in the same day. The clerk does not record the testamentary deed at length in the register; he merely inserts its date, the names and designations of parties, and the nomination of the executors. If the testator has conveyed specially a debt or a moveable, no confirmation as to such debt or moveable is necessary.

Intestacy. — The first step taken here must also be taken in cases where the deceased has left a will, but has omitted to nominate executors. This first step consists in obtaining what is called an edict; *i.e.* a writ taken out by the next of kin of the deceased entitled to the office of executor, subscribed by the Clerk of Court, and addressed to the whole relatives, or all who pretend to be relatives, of the deceased, to appear on a given day and object to the appointment as executor of the party suing out the writ; otherwise, on that day this party will be decreed by the Judge to be the true executor of the deceased. A copy of this edict is affixed, by an officer of the Court, at the Market Cross of the county town, and another copy on the door of the church of the parish where the deceased died, nine days before the day fixed for the appearance of any person intending to oppose what may be termed the grant of administration. On that day the edict is produced to the Clerk of Court, and if no appearance be made by any one, judgment is given in terms of the writ, appointing the party suing it out, the deceased's executor. If appearance be made, objections are ordered to be lodged within six days, and thereafter a competition ensues

for the office of executor, which is conducted in all respects as a summary action at law before the sheriff of the county, under the name of Commissary of the Commissariat.

Seldom does a case of this sort occur. If it does occur, it must be concluded before an inventory can be registered. But assuming that is concluded, or, what is the common case, that there is no competition, the party who, under the edict has been decerned or adjudged as entitled to be executor, lodges inventory and affidavit and obtains confirmation, which in this case is called "Testament Dative" (the Commissary GIVING the appointment as well as the title to the personalty), all as in the case of executors nominated, with this exception, that executors dative, as they are termed, must find security to the satisfaction of the Clerk of Court before the confirmation is granted, that they will administer the estate faithfully to all parties having interest.

With the single exception of determining who is or is not the next of kin of a deceased party, and thereby deciding who is entitled to be his executor, the local Commissary Courts of Scotland now enjoy no jurisdiction whatsoever. The clerks, who, in nearly all cases, are the sheriff clerks of the counties, act as mere registrars of inventories and of the appointments by the testator or the Commissary of the executors who lodge and make affidavit to the verity of these inventories. It may be remarked, that the whole of the business of the Commissary Clerk of Lanarkshire (who is a solicitor in practice) at Glasgow, which city has now a population of 400,000 souls and no small share of the wealth of Scotland, is done easily and well by one of the clerks in the office.

No notice has been taken of a mode of obtaining a title to the personalty of a person deceased whose next of kin decline to administer, generally in consequence of the deceased leaving more debts than assets. In such a case any one of the creditors of the deceased who has either a liquid document of debt, such as a bond or note, or who by an action constitutes his debt (*i.e.* obtains a judgment for it), may obtain an edict and pursue the same course as in the case of intestacy. His situation, however, is simply that of a trustee for the benefit

of himself and all other lawful creditors who claim a share of personalty; and the bond of caution or security he is obliged to grant, runs in these terms. The mode by which the other creditors obtain this benefit, is by insisting on being conjoined, as it is termed, with the "executor creditor," as an executor dative of this kind is generally denominated, which gives the power to compel a division of the personalty among all creditors claiming and entitled to a share.

TESTAMENTARY JURISDICTION.

THE subject of Testamentary Jurisdiction is one which now much occupies the public mind.

The existing system is universally condemned both on theoretical and practical grounds.

In theory, it is considered wrong that a purely civil jurisdiction should be in the hands of Church Courts.

It is also highly objectionable that the determination of the succession to real property should be severed from that of personal property.¹

The state of some of the Local Courts and of their record offices is a subject of great discontent; and in practice generally the present system is found to be unduly costly and dilatory; and, in disputed cases, it is believed that, owing to the use of written evidence, the elicitation of truth is frequently frustrated.

It being shown, therefore, that a thorough change in the Jurisdiction must be made, the question next follows, In what Court or Courts is it to be vested?

The success of the County Courts has created a just preference in the minds of the public for a local administration of justice as most cheap, speedy, and efficient. It is, therefore, indispensable that, in any plan which may be adopted, provision shall be made that Probate of Wills and Grant of Administration may be obtainable in the deceased's own locality, or in that of his representatives.

On the other hand, centralization is very desirable. Testamentary Jurisdiction is not necessarily local in its nature.

¹ See *post*, p. 133.

A man frequently dies leaving property situated not only in many parts of England, but in other portions of the empire and in foreign lands. The persons, too, who are entitled to the deceased's property, are frequently widely dispersed, so that the advantage of local jurisdiction is lost.

Although it is true that contested Wills form but a small fraction of the number proved, yet it does not follow that the Probate of the others is mere routine work. By a valuable Paper on this subject, presented to this Committee by Dr. Bayford¹, it is shown that in the majority of cases difficulties of considerable magnitude arise. Imperfect attestation clauses, alterations in the Will by interlineation, obliteration, or erasure, and the imperfect execution and cancellation of codicils, raise questions, the solution of which demands an amount of special experience and skill scarcely to be hoped for in a Local Court. These difficulties must occur far more frequently in wills or codicils disposing of small than of large estate, inasmuch as in the latter case the instruments are usually dealt with under the supervision of professional men.

It is most important, also, both that Wills should be kept in perfect security, and that they should be easily found when wanted. These conditions are incompatible with the existence of a large number of independent local jurisdictions.

Again, where opposition to the proof of a Will or Grant of Administration is contemplated, the opponent would, to secure for himself notice of any attempted proof, be obliged to lodge a *caveat* in each of such Local Courts — a most troublesome and costly proceeding.

It is also very desirable, in order to diminish expense and loss of time, that Probate and Grant of Administration should be made in a Court which is able to construe the Will and administer the estate. At present, at any rate, we have no Local Courts possessing the requisite power and machinery for this purpose.

The law of *Bona Notabilia* is a great evil, arising from local jurisdiction.

¹ "On the Distinction between Grants of Probate in Common Form and the Registration of Wills." The subject is elaborately discussed and illustrated in that paper.

It has been proposed, indeed, to abolish the foundation of the jurisdiction of a Local Court on *Bona Notabilia*, and to found it on the place of the death of the deceased, or upon his domicile at the time of death. Both of these suggestions are open to grave objection. The death of a person frequently takes place at a distance from his abode, in a locality with which he has no connection, and which would afford a most inconvenient forum for the adjudication of the succession to his estate. A man's domicile, on the other hand, is frequently difficult to determine; and even when determined, does not always indicate the most favourable locality for the settlement of his affairs.

Again, it is hopeless to suppose that foreign Courts will pay the respect to a Probate before a merely local Court, that they would to one before a central national tribunal.

Purely local jurisdiction, therefore, must be rejected.

The desideratum seems to be a plan, which, while it attains the advantages of local jurisdiction (namely, cheapness of procedure, and investigation of facts on the spot), should combine with them the benefits of central jurisdiction, which are first, a perfectly secure and easily accessible place for the deposit and registration of Wills; secondly, the means of obtaining notice of any intended application for a Probate or Grant of Administration, by entering a single caveat; thirdly, a Court fully qualified as well to determine the validity and legal contents of Wills, as to construe them and administer the estates, also to grant Letters of Administration, and to enforce a proper fulfilment of the trust; and fourthly, a Court respected all over the world.

It is submitted that the following scheme fulfils these conditions:—

A Central Court of Succession and Administration should be established in London, with an office attached to it, in which all Wills should be deposited in perfect security, and registered and indexed in such a manner that any Will could be found without delay or difficulty.

This Court should have establishments under it, scattered all over the country, in which Wills, with the necessary affi-

depositions, &c., could be received and transmitted to the Central Court, and in which local investigations could be made.

The question now arises, In what tribunal should this jurisdiction be vested? The Ecclesiastical Courts are condemned. The erection of new tribunals is contrary to the spirit of the age, which is strongly running towards fusion of jurisdiction. The Superior Courts of Common Law are open to the objection that they have neither the power nor the requisite machinery for administration of estates. The only remaining Central Court is the Court of Chancery.

This Court has for ages been the great administrator of the country. The integrity, security, and wisdom of its administration have never been doubted.

The great objection to this Court has been its cumbrous, expensive, and dilatory procedure. But this objection is by the late reforms being rapidly removed.

It is submitted, therefore, that the Court of Chancery should be constituted the Central Court of Succession and Administration; and for that purpose should be clothed with all powers incident to Courts of Law, of Equity, and of Probate.

In the Prerogative Court there is a valuable establishment of Clerks of Seats and Registrars, through the ordeal of whose examination all Metropolitan Wills must pass before Probate can be decreed to them. Any defect or matter of suspicion appearing on the face of the Will, or upon the affidavits in support of it, is by this means detected and brought to the notice of the Judge. This establishment should be transferred to the Court of Chancery.¹

The whole establishment of the Will Office, with the office itself and the wills now deposited therein, should also be over handed to the Court of Chancery.

This being done, Wills when brought into Court should undergo examinations analogous to those now in use in Doctors' Commons; and upon being found to be according to rule, should have Probate decreed to them.

¹ The special experience of these officers would at the outset be highly valuable. In course of time, however, their functions might be transferred to the regular officers of the Court of Chancery.

We must now consider the mode in which Wills are to find their way to Chancery.

In the metropolis and its neighbourhood (say within twenty miles), a district which contains no mean portion of the whole wealth and population of the kingdom, Wills, with the affidavits in support of them, might be lodged in the first instance at the Court of Chancery itself; but in other parts of the kingdom it would be necessary to have the establishments above mentioned, to receive them and forward them to Chancery.

With regard to these establishments the same argument applies as to the inexpediency of creating new institutions, as in the case of the Central Court.

We have now a system of local tribunals — the County Courts — spread over the whole country, so that no spot is far distant from one or other of them. It is suggested, therefore, that each County Court should be constituted an office for receiving Wills, with affidavits of execution, &c.; and also demands for Letters of Administration. These documents when received should be transmitted by the clerk of the County Court to the Court of Chancery.¹

The practical course might be thus: — The executor should take the Will to the County Court of the district in which he resides², lodge it there, together with affidavits from the attesting witnesses, of due execution, and of the sanity and proper disposing mind of the testator; also the Registrar's certificate of the death of the testator, or in case he died abroad, with such other evidence of the death as could be obtained. The clerk of the Court might be authorised to swear the affidavits. He should also take an affidavit of the amount of the personal estate, and receive from the proving executor the amount of the Probate stamp.³ These docu-

¹ It appears by an able paper communicated to the Committee by Mr. Robert Kerr, that a testamentary system exclusively local obtains in Scotland.

² If the executor resided in the Metropolitan District, this would be done in an Office of the Court of Chancery.

³ The requiring of the payment of the Probate stamp duty before proof, at a time when there can frequently be no assets got in, is a great hardship. Means might probably be devised for obviating this evil, without danger to the revenue.

ments the clerks should transmit through the post to the Court of Chancery, where they should undergo the scrutiny above mentioned, and, upon being found correct, Probate should be ordered of the Will. The Court, if not satisfied with the evidence, might direct more to be produced. Probate having been decreed, the Will should be deposited in the Registry Office, and a properly stamped Probate should be sent to the County Court, whence it should be handed to the proving executor.

In uncontested cases, which form the vast majority, the above proceedings would be all that would be necessary.

The course in contested cases might be as follows :—

Any person intending to oppose Probate of a Will might lodge a declaration as to caveat in Chancery, which should entitle him to notice of any attempted proof. Upon receiving such notice he should file a formal objection, the effect of which should be that the propounder of the Will should be put to prove it formally, — viz., according to the Chancery procedure, unless the Court should order otherwise. The Court should have power on motion to order the validity of the Will to be tried in the County Court through which it was transmitted, or in any other County Court, or at any Assizes or Sittings, as an issue. The Court to which any Will should be so sent, should have the power to determine upon its validity ; but either party should have the right to demand a special case to be drawn up and returned into Chancery to be argued and adjudicated upon, or to move in the Court of Chancery for a new trial.

The judgment of the ancillary Court should be returned into Chancery, and thereupon Probate should be granted or refused to the Will.

But where the Court of Chancery thought proper to try the cause itself, it should be proved, heard, and adjudicated upon in the same manner as any other suit, the Court having the power, if it pleased, to try the cause by a jury, which it should summon for that purpose.

Thus the distinction between proof in Common Form and in Solemn Form would be abolished.

Questions relating to the legal contents of Wills, as affected

by interlineations, codicils, &c., might be determined in the same manner.

It has been proposed that a mere deposit and registration of Wills should be substituted for Probate in Common Form.

It is submitted that this is an undesirable course. It is inexpedient to clothe a person with the powers of an executor, without some investigation of his title. An executor is the representative of the deceased, and consequently has the legal right to get in the assets and to compel payment from any person who may be unwilling to incur the expense of invalidating his title, or of filing a bill in Chancery. Thus a dishonest person might, by mere registration, enable himself to misappropriate a testator's estate.

The objections to intrusting the Jurisdiction to Local Courts¹ arising from the difficulties constantly occurring even in Common Form business, apply with still greater force to Registration. An executor by merely registering a Will, would not be informed what portion of the Will was legal, and what not. Nor indeed, would he or other persons know whether he were lawfully executor or not. The cases where no executor is appointed, or where executors decline to act, would be entirely unprovided for.²

Again, great hardship may accrue from the subsequent annulling of the title of an executor acting *bonâ fide* who may have paid the debts of an estate, and then distributed the residue according to the Will.

This sometimes happens from the invalidation of a Probate in Common Form under the existing law, in which case the executor is not allowed credit in his account for legacies which he may have paid.

We should suggest therefore, that no Probate or authority of any sort be granted except after the proceedings above mentioned; in addition to which, it may be desirable to compel the advertisement of notice of proof in the Gazette, and in newspapers circulating in the neighbourhood in which the deceased dwelt; copies of the Journals containing such advertisements, might be deposited in the Court of Chancery or County Court, together with the other documents.

¹ See ante, p. 127.

² See Dr. Bayford's Paper, 18 L. R. p. 323.

A Probate once granted, should not be annulled, except on good cause shown, and then the executor (unless he has been guilty of fraud) should be allowed all *bond fide* payments not only for debts and expenses, but for legacies; which latter should be recoverable from the legatees by the person who should become the legal representative of deceased.

The procedure to annul a probate might be by motion in the Court of Chancery for a rule, calling on the executor to show cause why the probate should not be annulled; and the matter might, at the discretion of the Court, be determined on motion, or be proceeded with as in case of a contested proof.

No proceeding to annul a Probate should be taken after a limited time.

In cases of intestacy, a similar course, *mutatis mutandis*, should be pursued as in case of proof of a Will. A party seeking Letters of Administration should deposit at the Court of Chancery or County Court, the Registrar's certificate of the death of the intestate, and affidavits showing due search for a Will, and that the applicant is next of kin (or that he has given notice to the next of kin), &c., and of his title to administration.

These documents should be transmitted to Chancery and dealt with as in case of a Will; and Letters of Administration should be granted and issued, and copies thereof registered in the Will Office.

Application might be made to annul Letters of Administration, and to propound a Will of the deceased, on a procedure similar to that proposed for the annulling of a Probate.

Letters of Administration with the Will annexed, might be granted upon the above practice with slight modification.

It would be most desirable that Probate as above should establish a Will as to realty, as well as with regard to personalty, and that such Probate should be necessary to clothe the devisees with their legal estate. This would frequently save great expense in proving a Will many times over, and would greatly strengthen and simplify titles to landed property.¹ Indeed, when it is considered that nearly all Wills of

¹ A few years ago an Irish nobleman who held his estates under his father's

realty are also wills of personalty, and consequently must now be proved¹, the advantage of including realty in the Probate is obvious. If any system of Land Registration should be adopted, it might be provided that Wills of realty should be indexed as in every district in which any part of the land is situate.

Letters of Heirship, analogous to Letters of Administration, might be granted in cases of intestacy of realty: this would produce a benefit similar to that accruing from the Probate of Wills of realty.

A Probate or Grant of Administration should clothe the persons thereby appointed representatives with the legal estate of the deceased's property, not only all over England and Wales, but throughout the empire, and indeed, so far as that can be effected by a British law, throughout the world.

Considerable difficulty sometimes arises from the present state of the law of succession, whereby an executor who declines to prove or even renounces Probate, still continues a representative of the testator; so that if he survive the proving executor the representation does not pass to the executor of the latter. This frequently necessitates the taking out of Letters of Administration *de bonis non administratis*.

It is suggested, therefore, that where an executor renounces Probate, or neglects to come in and prove within a given time, he should be considered to be out of the representation as if he had never been named an executor.

The above changes, the Committee venture to hope, would bring the testamentary law into harmony with the wants and requirements of the age.

RESOLUTIONS AGREED TO PREVIOUS TO THE MEETING ON THE 17TH OF MARCH, 1863.

I. "THAT the Testamentary Jurisdiction of the Peculiar

Will which had been proved and deposited in Doctors' Commons, was compelled to obtain a Private Act of Parliament to make the Probate evidence, to avoid the ruinous cost of bringing the original Will over to Ireland every time he had to try an ejectment against a tenant.

¹ See Dr. Bayford's Paper on Probate and Registration.

Courts in England and Wales, and of the Manorial Courts, should be abolished.

II. "That the present jurisdiction of the Ecclesiastical Courts, so far as testamentary matters are concerned, is universally admitted to be unsatisfactory, and requires extensive reform.

III. "That the jurisdiction to grant Probate of Wills and Letters of Administration is in its nature a civil jurisdiction.

IV. "That it is desirable that any Court having jurisdiction in matters testamentary should have jurisdiction to determine the validity of Wills both of real and personal estate.

V. "That it is desirable that the same jurisdiction which has power to determine the validity, should also have power to determine the construction of Wills.

VI. "That it is desirable that the same jurisdiction which has power to determine the construction of Wills, should also have power to administer the assets.

VII. "That it is desirable that Probate or Letters of Administration, wherever granted, should confer title as to the whole real and personal estate of the deceased wherever situate.

VIII. "That the place of death should found the Jurisdiction of any Court or Courts possessing the right to grant Probate or Administration, the doctrine of *bona notabilia* being for that purpose abolished.

IX. "That in order to provide for cases when the property of deceased is of small amount, it is desirable that there should be local jurisdiction authorised to grant Probates and Administration."

RESOLUTIONS CARRIED UNANIMOUSLY IN THE COMMITTEE
ON MARCH 17. 1853.

Dr. Lee, D.C.L., in the Chair.

Moved by MR. STEWART; seconded by MR. PRITCHARD,—

I. "That the present jurisdiction of the Ecclesiastical Court, so far as testamentary matters are concerned,

is universally admitted to be unsatisfactory, and requires extensive reform.

- II. "That this reform should consist of a transfer of their present jurisdiction in testamentary matters to a Court clothed with jurisdiction as well over Wills of Real as of Personal Estate.
- III. "That to create a new Court for the purpose would be unadvisable if any existing Court can be found to which such enlarged jurisdiction may be properly intrusted, and to which complete powers can be given.
- IV.. "That the existing Courts of Common Law and County Courts not having an equitable jurisdiction or power of dealing with trustees, or with equitable matters arising in the construction of Wills, should not, as at present constituted, be intrusted with such enlarged jurisdiction.
- V. "That the existing Courts of Equity not having any power of empanelling a jury, or of conclusively deciding issues of fact, are under a similar disqualification.
- VI. "That in order to do complete justice in testamentary matters it is necessary that the Court to which they are intrusted should possess the full and conjoined powers of a Court of Law and of a Court of Equity.
- VII. "That no thorough or satisfactory settlement of the questions pending with respect to the testamentary jurisdiction of the Ecclesiastical Courts can be come to, except by its being exercised by a Court of conjoined Law and Equity, having jurisdiction over Wills of Real and Personal Estate.
- VIII. "That it is the bounden duty of the Government of this country to provide such a Court for the proper adjudication of all testamentary matters, and of this Society to promote its establishment by every means in its power.
- IX. "That the most desirable means of effecting this appears to be the union of the present Law and Equity

Commissions, and inviting their immediate attention to this important subject.

- X. "That the above Resolutions be taken as the basis of the first Report of this Committee."
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ART. VIII.—LORD BROUGHAM ON THE PROGRESS
OF LAW AMENDMENT.¹

Lord Brougham's Speeches in the House of Lords, 26th and 28th July, 1853, on County Courts and Law Amendment.

JUST at the end of last Session, Lord Brougham took occasion in two Speeches—one on the Irish Common Law Procedure Bill, and the other on the County Courts Bill—to mark the progress and prospects of Law Reform.

These Speeches, published in a short pamphlet of forty-seven pages, give a clear, rapid, and vigorous outline of the present state of things, and point with cheerful confidence to the progress which has been made since his Lordship's great effort in 1828.

It should shame many younger men, that to him so exclusively should be given the constant renewal of such efforts. Both of the Speeches ought to be read as a convenient as well as forcible *resumé* of many points to be aimed at, especially in regard to our Local Judicial System.

In truth, the topics are multitudinous, embracing every department of Judicial Administration, from the creation of Office of Minister of Justice to the regulation of minor points of procedure;—the legislative principles to be adopted in or applied to the organisation and constitution of our tribunals; and also the Financial Administration of our Judicial System,—the Funds—the Fees,—the Expenditure and the Salaries of the Officers of the County Courts.

Encouraging and inspiring as is the tone of his Lordship's statement on the progress of Law Reform, to us it leaves a feeling we had almost said of despondency.

¹ Some of the opinions in this Article are not in accordance with those of the conductors of this Review; but they deserve consideration.—*Ed.*

The Appointment of Commissioners, to which he adverts in a note at the conclusion, has always to us the character of a promise rather than of performance. A number of distinguished, amiable, and accomplished gentlemen are associated together, often without experience in the office of inquiry, or clear views of the present position of affairs, or a definite course as to the future. They meet, they inquire, they discuss, they compromise, and commonly come to conclusions so indefinite or so unpractical, that the Minister by whom they are appointed, and whose responsibility is more nearly concerned, usually hesitates to carry out their recommendations.

No Commission should issue till, by a preliminary inquiry, the present state of matters has been ascertained; and, till the course of future inquiry has been distinctly marked out, and its purpose indicated; and when the Commission has reported its recommendations, it should be charged with the duty of realising them.

To this end, the Chancellor and the leading law advisers of the Crown ought always to be members of the Commission, and should have the chief regulation and conduct of its proceedings; so that, when the result is come to, they should be prepared to carry it out without further delay and "consideration."

The Commission should be of the nature of a Council assistant to the Chancellor rather than a substitute for his volition, his industry, his practical energy.

To this method of proceeding we attribute so much delay in the progress of Law Reform, and also the inconsistencies and incongruities which must result from so many independent Commissions, each adopting its own line of action without concert with the rest.

We have now arrived at that stage of Law Reform which justifies more decisive action. The principle is established; it is now a question of means and method; and although we would wish our present excellent leader in Law Reform (we had almost said Minister of Justice) Lord Brougham, who has so long actively performed the duties of that office, with so much patriotic zeal and disinterestedness, long life and

vigour to realise for us further harvests of Reform, we yet cannot be insensible to the necessity of securing for the country a more regular and systematic succession in this office, and the means of executing its high functions constantly and responsibly, without agitation, without vacillation, without fear and trembling, and without alternations of hope and despair.

The Speeches of Lord Brougham tell us of a long Bill to amend the procedure for the administration of Justice in England, followed by another long Bill to accomplish the same identical purposes in Ireland;—that Ireland possesses juridical blessings which England has not, and that Scotland is equally rich in advantages.

How absurd that the different parts of this great Empire should, under similar circumstances, enjoy different kinds of law,—different systems for the administration of Justice; and that every change for the better should be effected by three separate and independent arduous struggles.

Is there no way of uniting under one chief legal administrator the three countries, and effecting our improvements in concert with each other—to give to all the benefits which any enjoys, and to extract from their separate systems whatever is alike advantageous and applicable to the respective conditions of all? How monstrous again the absurdity of the County Courts coming into existence in the manner described by Lord Brougham, the abuses in the Fee system being so long allowed to continue, and the whole reformation, or the promise of reformation, in the shape of a Commission, being produced, not in a normal legitimate way, but by an indefatigable and arduous effort on the part of Lord Brougham, whose great powers, relieved of this physical as well as intellectual exertion, might have been so much better employed in assisting to perfect other arrangements for Law Amendment, especially, we fear, that disappointing one, the Statute Law Commission, which mocks so painfully the excellent purpose of the Chancellor.

If the Chancellor were assisted, as unquestionably that high functionary ought to be, by proper officers—by a secretary in matters of judicial legislation—by a financial

officer in matters of judicial finance—by a local officer in regard to the distribution of arrangements over localities, so as to provide for the proper sittings of the Courts, or the attendance of judicial officers, according to the exigencies of the local committees—by a visiting, inspecting, or superintending officer, to see that the local arrangements are carried into effect—by a remembrancing or controlling officer to regard the distribution of business over time, and the ascertaining that the business so appointed be duly done—by an inquiring officer to execute his preliminary inquiries and assist in his legislative investigations—and by legislative officers conversant with the Law in all its branches, and capable of giving expression to the Law by proper instruments, we should not need commissions, or at least but to a very limited extent, and the labours of a Brougham, for a quarter of a century, would not be requisite to procure piecemeal amendments and to ensure the accurate making of them.

In the notes which we have made of Lord Brougham's speeches, we find topics falling under every head—of Judicial Administration, of Judicial Establishments, Agencies, and Offices, of Judicial Inquiry, of Judicial Action and Execution, of Judicial Legislation, of Judicial Finance, of Special Jurisprudence, of Judicial Local Arrangements, of Judicial Superintendence and Control, of Judicial Registration. We must not attempt to refer to all the numerous topics falling under these heads, some of which are touched slightly in passing, others treated of more elaborately, but we must refer our readers to the pamphlet itself.

We will notice a few for the benefit of those who are too parsimonious to buy the pamphlet, or too lazy to procure it.

Lord Brougham adverts on the defects of the County Courts Bill occasioned by driving it through the House so late in the Session, upon the extension of its jurisdiction (and by the way accords high and due praise to Mr. Fitzroy for his share in this enterprise), to the accessions of jurisdiction under the Charitable Trust Act, the Succession Duty Act, and the Customs Regulation Act.

In his earnest hopeful spirit he looks forward to its further

acquirements in Bankruptcy Jurisdictions, in Arbitration, in the Presidency of Quarter Sessions, and he very warmly and indignantly deprecates the attempt to lower the character and position of the County Courts by calling them Small Debt Courts, and treating them as Inferior Courts, which the prejudice and jealousy of their elder brethren in the law have somewhat encouraged. We hope to see the day when the Provincial Judges shall not only, as Lord Brougham suggests, and as was originally intended, have salaries proportioned to their districts, but be also encouraged by appointments to the Bench of the Metropolitan Courts.

He vindicates the merits of the County Court Judges by showing how small has been the number of appeals, and of these how much smaller the number of reversals.

We desire to draw attention to this question—to the necessity of creating or recognising the judiciary body, and it may be of employing their services in fractional portions of the consolidation of the Law, and of the registration and digesting of decisions and other matters subsidiary to the Chancellor, which will not interfere with their primary duties, so that they may keep alive their knowledge of law and be had in remembrance by their London professional brethren, who are apt to suppose that when they are appointed to these posts their friends have gone with other country mice to eat their way on some country shelf to be no more heard of or seen.

It is clear that no intellectual vigour can endure without ambition; the moment a man has determined that he will live in a limited circle of occupation, his mental frame becomes attenuated and he falls into a moral decline.

A year or two ago there was a Bill to enable persons not of the degree of the Coif to preside at Nisi Prius. Why in the name of all that is modest should not the County Court Judges be included in the Commission? if they are not fit to be there, they are not fit to be Judges at all. Such an arrangement would give occasion for the exercise of the office of Judge in the higher capacity, and enable them to prove their fitness to act always in that capacity. It would also assist in inspiring respect in the localities where they

act, and to keep up habits of proper dignity, from which a man is apt to descend, where he does not act constantly in the presence of an audience nearly approaching him in degree, or not in the presence of equals of a high grade.

As the Bar is not likely in times to come to be so much as it has been a field of enterprise, where great fortunes and great distinction may be earned, men will naturally seek a seat on the Bench earlier than they used to do, especially if that seat does not preclude their appointment to higher judicial office; which will give scope to that judicial ability which is wanting in the special aptitudes of advocacy.

Among Lord Brougham's topics is the Condition of the Local Bar. In former times, we believe, it was not unusual for a man to commence his career in the provinces, and after winning his way upward, to seek higher distinction in the metropolis. The same course would not be inexpedient if men started at first with qualifications duly established and ascertained by examination; otherwise we should fear that beginning in a narrow field they would not obtain a sufficient mastery of their profession, except in the higher provincial courts. Yet we must remember that some of the foreign Jurists, who have obtained a world-reputation, have commenced, and indeed practised for life, in provincial tribunals. The greater leisure is more favourable to study and reflection, and to turning to account the results of practical experience.

In adverting to the improved condition of the Bar in Local Courts, we do not overlook the value of a high-toned agency in the person of the Attornies, and the importance of doing nothing which would stem the improvement of their position and character.

We consider that to a strong tribunal (and no tribunal should be permitted to exist which is not strong in all the elements of judicial strength) it is not only necessary that we should have a Judiciary intelligent, learned, independent, and free from corruption; but a Bar possessing the same qualities,—an honest, honourable, and capable agency in the shape of Attornies; proper and sufficient officers of Courts; and also publicity in the free access of the Public, and in the

attendance of the Press, to which ends all Judicatures in each locality should be consolidated, and the Court should be omniscient. It has often occurred to us that the creation of a good Bar might be assisted partly by the appointment of Counsel for the Crown in all matters in which the Crown was concerned, which would supply the want of public prosecutors so much needed for the due enforcement of the Law, and partly by devolving on some member or members of the Bar the duty of making reports of judicial proceedings, which might, through some appropriate means, find its way to the Press. The arrangement would have a double effect; it would tend to establish a more definite and constant responsibility in the Judge, and also to instruct the local public in legal matters, which is one of the offices and uses of a Local Court.

How obvious is it that one reform hangs upon and waits for others; and how obvious too the necessity of some presiding authority to watch the occasion, to select the means, and to superintend the adoption of those means, till we have one system of Law, and one system of Tribunals through at least each nation; for it is a singular thing that neither England, Ireland, or Scotland have an homogeneous system, though Scotland is better off than the rest. We do not advocate any hasty change, but a cautious, regular, systematic, and progressive course of amendment, under the most responsible direction and superintendence, that of the Chancellor, furnished with all facilities that so high and varied functions absolutely need.

Lord Brougham speaks emphatically on two topics, for which we have left ourselves no room to particularly advert; viz. the amendment of the Private Bill System, which he denounces for its anomalous and questionable jurisdiction, and its powers and procedure. He intimates there is some prospect of immediate amendment. The other topic is the Revisal of Public Bills. We have long and earnestly advocated a measure of this sort; but if done at all, it should be done wisely and well, under adequate arrangements, the *personnel* well trained and well recommended, acting under proper responsibility. So much has been suggested on this head,

that it needs but an industrious compiler to frame a measure which should put such arrangements on a proper footing. Care must be taken that, as in the Statute Law Commission, a system is not improvised which cannot work to an efficient result. It is far too delicate an affair to be disposed of rashly, without due consultation with those who have long paid attention to the matter, and without all due provisions and guards.

Our readers must not expect in Lord Brougham's Pamphlet an elaborate exposition of the points to which we have adverted. Its contents were addressed to the House of Lords, which would not bear elaborate detail. Its merit is its suggestiveness; and the calling up to one's mind, in somewhat connected array, the various topics of Law Reform. Our readers will do wisely to devote the first spare hour to its perusal.

ART. IX.—LAW REFORM PROSPECTS.

Extract of a Letter from Lord Brougham to Lord Denman.

. . . . "But I pass over all these things,—the risk which the great cause of Law Amendment runs from the excitement that may possibly be raised upon Parliamentary Reform (it certainly has not as yet been perceived),—the far more dreadful peril to all the interests of the community from the war which some portions of our countrymen seem much disposed to see undertaken, who would probably be the first to cry out for peace when the bill of costs was presented. I hasten to recount our successes and our disappointments during the last Session, gathering from the one encouragement to pursue, from the other warning to guide, our future course. One thing I must, however, stop to note,—the unaccountable opinion given by an able and very distinguished friend of ours, now at the head of the Home Department, that Law Amendment could not have any great place in the affections of the people, because no public meetings were

held in its behalf. That Exeter Hall should not be crowded with multitudes of all classes and of both sexes, to hear discussions on points of Law, neither surprises nor grieves me, any more than the desertion of that building when delicate and complicated questions of Foreign Policy are occupying the attention of statesmen,—questions which my noble friend would probably not desire to see handled there, unless he has changed his views with his office. But that the well-informed and reflecting portions of the people continue to take the liveliest interest in the improvement of the laws they live under, and that they will very intelligibly make their determination known and felt, to have all well-considered amendments of our legal system effected by the Legislature, as speedily as is consistent with mature deliberation, I believe to be as certain as any proposition which can be affirmed touching the course and the force of public opinion. I will go further and assert, that the desire for Law amendments with good speed, has become both more general and more strong each succeeding year, until we may venture to trust that it prevails through the whole community, and cannot any longer be thwarted by the Government, to whose hands soever entrusted. Indeed, it is only fair to admit, that no disposition of the kind is evinced by any party in the State, if party can now be said to exist.

“ Nothing can show this more clearly than the proceedings of the Government at the beginning of the last Session. The great measure of digesting the Criminal Law, begun by their predecessors, but left, for want of the last hand, still imperfect, was taken up and referred to a select Committee, upon the plan described in my letter of 16th August, 1852, as having been, after much consideration, approved by Lord Lyndhurst as well as myself,—that of passing it through Parliament first in four or five distinct chapters, and then substituting one Act to embrace the whole, so that the articles may be numbered consecutively. The most important and difficult division,—offences against the Person,—was elaborately gone through in the Committee, reported to the House, and only postponed in order that the opinions of the Judges might be obtained upon the detail of its provisions, it

being the unanimous determination of the Law Lords, in which the rest of the House joined, that the Bill should be proceeded with at the commencement of next Session, and sent down without delay to the Commons. Preparation was at the same time announced as having been made by the present Government, for passing the next division,—that of offences respecting Property; and it is by no means an unlikely thing, that the whole Criminal Law Digest may be passed in the form of a single Act before the close of the Session. Criminal Procedure must of course form a separate Digest; it will be more difficult and also more important.

“In the letter to which I have referred, a confident belief was expressed, that the other branches of our Law would next be digested, the process to begin with the Statute Law. This course has already been entered upon, a Commission having now for some months been engaged on that work, under Mr. B. Ker, himself one of the Commissioners to whom the digesting of the Criminal Law had been referred.

“When I addressed you a year ago, my earnest recommendation was given of a thorough revisal of our Local Judicatures both as to their practice and their constitution; and the reasons were urged for undertaking this inquiry, without waiting until a longer experience had disclosed faults, and suggested improvements. In truth, the fact that above 30,000 courts had been holden during the five or six years of the system being in operation, was decisive to show that we were now ripe for the investigation. The Government have most properly issued a Commission, under the Master of the Rolls, and so composed of County Court Judges as well as others, that we may entertain the most sanguine hopes of seeing the whole of this most important subject thoroughly sifted, and the most valuable suggestions offered to the Legislature, the result of the experience of those Courts, and the discussions of the Commissioners. The only difficulty which I can foresee will be the giving them Equitable Jurisdiction. The limit of the sum in dispute of course is here wanting; but the Bill which I have twice brought in seems to furnish a safe and easy means of con-

fining the jurisdiction within reasonable bounds. Allow a removal of the suit to the Court above (Chancery) on cause shown before a Judge of that Court at chambers; and give an appeal on matters of Law or Equity, with a power of applying for new trial on matters of Fact, subject to proper restrictions.

“Another Commission was issued in consequence of the great Conference upon the assimilation of the Mercantile Law held last November. This meeting was of the most satisfactory nature, and gave the greatest confidence to all friends of improvement, both from the zeal which it proved to exist in all the great trading towns of the three kingdoms, and from the good sense and conciliatory spirit which prevailed among their delegates. Having had the honour of presiding on the first day, I can bear testimony to this, and our excellent friend Lord Harrowby, who presided the next day, will, I am confident, join in the statement. He headed the deputation to Lord Derby, asking for a Commission, and every disposition was shown to grant it; but a doubt being expressed how far the City of London had concurred in the proceedings, the Government was changed before this could be cleared up. A petition which I presented immediately after the Easter recess from all the great houses of the City in every branch of trade, removed all doubt, and the Commission was forthwith agreed to by the Government. It may be mentioned that a much more extensive plan had at one time been suggested, — the formation of a General Code of Commercial Law by the concurrence of all nations. But our judicious and most learned friend Mr. Stewart, perceiving that such a scheme was beset with great difficulties of various kinds, and that the promotion of it would obstruct more practical measures, successfully urged the expediency of beginning with the limited though highly important proposal of forming a Code of Mercantile Law common to the different parts of the British dominions.

“In no branch of that Law is this assimilation so necessary as in Bankruptcy. The Bill which I presented in March, and which was read a second time in July, with the view of referring it to the Commission, has for its object the extend-

ing to Scotland all the improvements which have of late years been made in our Bankrupt Law, and of which above twenty years' experience has attested the value. But it also removes the greater part of the imperfections in the Scotch system, so long and so generally complained of by the mercantile community. That Bill was prepared by the body of London merchants and traders whose dealings connected them with Scotland. It was drawn with the greatest knowledge of the subject by my friend Mr. Gilmour, secretary of their committee, now of the English Bar, formerly a Scotch practitioner. It was strongly recommended to Parliament by petitions from the trading interests in Glasgow, Leeds, Manchester, Liverpool, above all, London, from which I presented a petition signed by above two hundred of the great firms interested in trade with Scotland, the first five of which carry on that business to the amount of more than a million yearly. Since Parliament rose Mr. Gilmour has repaired to Scotland and held conferences with the mercantile bodies in all the chief towns, and the result has been, not only ascertaining their favourable disposition towards this important measure, but the obtaining valuable suggestions for its improvement, through his very able and judicious conduct of the discussions. I regard it as a most fortunate circumstance that Mr. Slater, the chairman of the London Committee, and who, though transplanted to a far more brilliant position, was himself bred to the Law in Scotland, is a member of the Assimilation Commission, nor can I help deeply lamenting that as yet it has not also the benefit of Mr. Gilmour's services.

"The extending to Scotland the inestimable benefits of our County Court system, dwelt upon in my former letter, has been unhappily delayed. This has partly arisen from the great difficulties that attend a remodelling of the Sheriff's Jurisdiction; and the experience of the last Session inclines me to think that, without attempting as yet to abolish the double sheriffship, the resident and non-resident officer, we should for the present rest satisfied with increasing the Small Debt jurisdiction to fifty pounds, abolishing evidence and procedure in writing, confining appeal to matters of Law,

and abrogating the intermediate review. Mr. Craufurd's Bill, which was rejected, had gone a good deal further. I must say that it was most carefully and ably prepared, and I trust that he will again bring it forward, though I incline to think his confining it, as I have just stated, might be expedient, at least in the first instance.

"The admission on all hands, and by all the members of the Government, that there must at length be an end of law taxes, especially in the County Courts, I hold to be a most important step which was made last Session. To be sure when it appeared that sums varying from twenty to thirty-three per cent. upon the amount obtained by the proceedings are extorted by the Treasury in order to pay the Judges and other officers, and to provide court-houses, the doom of the intolerable grievance might well seem to be pronounced. The Chancellor even was disposed to have sentence executed, without waiting for the inquiry of the Commissioners, but he of the Exchequer had unfortunately no means at his command of providing for the deficit, and so we must continue to endure the evil yet a little longer. I observe, however, one advantage is taken of this, and it shows the fatal tendency of abuses, not only to continue their own race but to create new ones, both scattering their pernicious seed and sheltering others unlooked for. The expense of our County Courts in the recovery of small sums,—an expense wholly caused by the Court fees,—has been urged in Scotland as a reason against adopting our system, though but for those Court fees it gives redress for wrong at a far lower price than the Sheriff's jurisdiction.

"Another advantage has been found of great value in the perfecting of the Evidence Act, 1851; but first let me say in the testimony borne to its beneficial operation. We were aware of the Judges, even those who at first had been averse to it, having, with one voice, declared in its favour, as giving most important aid in the discovery of truth, and affording checks to falsehood; nor can my sense be sufficiently expressed of the candour with which this opinion had been given by some of those learned persons. But it was most satisfactory to hear the Chief Justice declare this

on the part of his brethren, which he did in the most explicit and unqualified terms. To render this great amendment of the Law complete, two things were wanting — extending it to the testimony of husband and wife, and extending it to Scotland. Both these things were accomplished. The Chancellor, whose objection had occasioned the introduction of the proviso in 1851, with exemplary candour, avowed that further reflection, as well as the working of the Act, had altered his opinion. The Lord Advocate, who had refused to adopt an Act in his Bill of 1852, introducing some valuable improvements in the Scotch Law of Evidence, offered no opposition to the Bill now introduced; indeed I have reason to know that had I not presented it immediately on Parliament assembling after Christmas, he would himself have brought in a Bill, with the concurrence of the faculty of Advocates. It happened that, by the delay in the Commons of the Bill for England, the Law was for some months made in its perfect form for Scotland, while the English Law remained with the imperfection as to husband and wife. Now, not only was there the anomaly of a different law on this important subject being administered in the two countries for nearly half a year, but the whole of our circuits were held under the exploded law, after the opinion had been universally expressed that it should forthwith be altered, in consequence of the great evils, in many instances the failure of justice, which had resulted from it. Had there been a Minister of Justice, this serious inconvenience, to give it no worse name, could never have arisen. It was no one's duty to watch the proceedings upon the Bill which we had sent down to the Commons. An accident alone apprised us that it had not passed there, as every one supposed an important measure must have done, to which not the least objection had ever been made in any quarter; and so great appeared to the Chief Justice the evil of the amended law only coming into operation after the close of the juridical year, that he thought the standing orders should be suspended by the Commons, in order that it might be passed forthwith.

“The other changes in the Law of Evidence, which I proposed in my letter of last year, were made the subject of a

Bill, which embraced also the improvements in procedure then suggested. That Bill was framed while I remained here; but it received great improvement, and one or two material additions, afterwards from Mr. Pitt Taylor; but neither of us had had any communication with the Commissioners. It was, therefore, most gratifying to find that they in their Report recommend, with, I think, only one exception, the whole of the changes propounded by the Bill. Of the Report generally, it would really be impossible to speak in terms of too great commendation. The views are truly large and enlightened, which prevail throughout; and, I believe, there can be no doubt that they have met with the approval of the Profession. It has been announced that a Bill will, without delay, be brought in by the Government, to carry into effect all the suggestions of the Commissioners. The draught which I have seen coincided so nearly with the Bill presented by me last November, that I shall not feel it necessary to do more on the subject than again endeavour to carry the provision respecting self-crimination.

“ We have scarcely less reason to congratulate ourselves upon the course pursued by Mr. Whiteside, when Solicitor-General for Ireland, than upon that of the English Commissioners. The Procedure Bill, which he introduced at the beginning of the Session by a speech of the greatest ability, and expounding the soundest principles, was framed upon all the doctrines of Law Amendment which we have been inculcating for the last five-and-twenty years; it not only applied to Ireland the provisions of the English Bill of 1852, but also adopted all the recommendations of the Commissioners, and in some material particulars went considerably beyond those recommendations, especially in giving a most important share of equitable jurisdiction to the Courts of Common Law. This measure was carried through all its stages in the Commons, not only without opposition, but with general applause; but unfortunately when it reached our House the Session was very near its close, and the Judges had left town on their Circuits, so that I was under the necessity of postponing the greater part of the changes which it made in our law till next Session. Several improvements on that

law were, however, adopted, and in so far Ireland is for the present in advance of us, as she was for so many years in the important particular of Local Judicature.

“ In nothing is this Bill more to be commended than the principle which pervades it of substituting natural for technical procedure,—the great object of all or nearly all the improvements which we have of late years been labouring to effect, and many of which have been accomplished; such as the alterations in the Law of Evidence, and the establishment of Local Courts. But again I must recur to the greatest of all these measures, the most grounded on unquestionable principles of natural reason, the most certain to produce the blessed effects of peace and comfort and satisfaction to all classes of the community,—the exercise by the judge of the office of conciliator, by hearing parties in the absence of professional advisers. Despairing of obtaining this, we may gain a great deal in the same direction by improving the Law of Arbitration, now so defective, and giving it the efficacy which it so greatly wants. The Act of 1833 first made submissions irrevocable; strange to say, twenty years have elapsed, and in all other respects a deed or an article of reference is, both in Law and in Equity, as nearly as possible waste paper. Having adverted to this subject generally in my letter last year, our friend Mr. Hawes, chairman of the City Committee, stated how anxious mercantile men were to have some amendment of the law as regarded the common provision in deeds of partnership, as well as charter parties and other mercantile instruments. But I conceived that it would be right to go a good deal further: and I had the invaluable assistance of Mr. F. Russell (well known to the Profession by his excellent book on the Law of Arbitrament) in preparing a Bill for encouraging references and facilitating proceedings before arbitrators. When this Bill, which was well received by the Lords, shall pass, a great step will be made towards the attainment of what ought always to be the object of the lawgiver, the encouragement of rightful litigation, the discouragement of wrongful, and the expediting and cheapening of all procedure. But I have resolved to make an important addition to the Bill when I again introduce it.

All the provisions as they now stand are merely permissive. Parties are enabled to refer to the County Court judge; the proceedings before him, and those before any other arbitrator, are rendered effectual by various enactments. The Report of the Commissioners, to which I have more than once referred, recommends that a judge at Nisi Prius should have the power of compelling a reference to the County Court judge where the case resolves itself into a question of account. This power must evidently be carefully guarded by such checks as shall prevent the getting rid of a trial by a reference after all the expense of bringing the cause into Court has been incurred. One check would be, the parties having previously been before a judge at chambers and persisting in the litigation contrary to his opinion. Now it appears to me that a general power should be given to either party of bringing his adversary before a judge at chambers, there to show cause summarily why the matter in dispute should not be referred. If the judge determined that it ought, then the costs of the trial should fall on the party refusing, whatever might be the event of the suit, unless the judge who tried it certified in his favour. If the Bill passes with an addition of this description, I think we shall come as near as possible to the Courts of Reconcilement, and by the most unexceptionable route.

“It appears, further, to be highly desirable that the parties should in all cases have the option of choosing the County Court judge to whom their case is referred, and that the judge at Nisi Prius or at chambers should only decide when they cannot agree. I conceive that a like option in cases of extending the jurisdiction by consent should be given. Indeed I have known that power in the existing Acts fail to afford relief to parties who were very desirous to have their cause tried by virtue of the optional clause, but would not carry it before the judge who alone could have tried it; they would most willingly have gone before any of the neighbouring County Courts. I subjoin part of a letter which I have just received on this subject from our learned and excellent friend Commissioner Hill, as I am sure his views, coinciding with our's on this important subject, will give you satisfaction.

“ Another improvement of the law seems requisite, in order to complete the substitution of Natural for Technical Procedure, — the examination of the parties by the Court, whether judge or arbitrator, in case they should not tender themselves, or call for one another. It often may happen that a person prefers resting his case on his witnesses to undergoing an examination himself; and that his adversary prefers the benefit of the observation upon his keeping back, to the risk of forcing him forward. In this case, the Court should have the power of calling him, if the case does not appear clear without his examination.

“ I cannot help feeling that the examination of parties in civil cases must lead us to reconsider the rule which we have hitherto held strict, — of excluding them in criminal cases, or, rather, of excluding one of them — the defendant; for, though in contemplation of Law, the prosecutor is only a witness for the Crown, yet, substantially, he is the party as well as witness. Shall we then continue to shut his adversary's mouth? I entirely agree with you; indeed, your argument many years ago has for ever settled the question, that no such conflict between the Judge and the prisoner, as the French Courts daily witness, ought on any account to be permitted. But surely there would be no harm in allowing the prisoner to tender himself for examination, subject to cross-examination of course, and subject also to the penalties of false swearing. It is very probable that he would seldom avail himself of the permission, especially if he had professional assistance and advice. But, then, the injustice at present done him would be avoided. The case could not occur, which now is not unusual, of a party prevailing in a Civil Suit and being defeated in a Criminal Proceeding, arising out of the very same facts, because in the one he (and his wife) could be heard, but not in the other. But in this, as in every part of our Criminal Law, we meet at each step with the great defect — the want of a Public Prosecutor, and as this can be supplied, the first steps at least can be taken, and the most important towards supplying it, without any Act of Parliament, by the Government itself (everything was prepared for it when we quitted Office in November, 1834),

I would fain hope that we shall not much longer have to repeat the complaint, any more than to renew the call for a Minister of Justice, which can easily be answered in the same way.

“ It is not easy to touch the subject of the Criminal Law without a reference to the body so largely concerned in its administration; and how ready soever we may be to acknowledge the gratitude which all feel for the gratuitous services of our local magistrates, surely they would themselves be the last to require that our obligations to them shall not be increased by improving the system, removing its abuses, and supplying its defects. This is one of the very few portions of the statement made in 1828, which I have not had the satisfaction of seeing produce good fruit. It is not my intention to dwell upon the matter at present, but I cannot imagine that we shall find it possible to avoid much longer making some provision for securing the individual responsibility of those who form the Courts of Special and of Quarter Sessions, by limiting their numbers, and for affording them the invaluable assistance of a learned chairman, such as the County Court judge,—a course every where pursued in Ireland, and with the best effects.

“ We have still to lament the postponement of the Registry Bill, which has once more passed the Lords and been stopt in the Commons. The Charity Trusts Bill, however, has at length happily been carried; and this is one of the most gratifying events of the Session.¹ Our satisfaction is doubtless not a little damped by the reflection that this important measure ought to have been in full operation at least seven years ago. The laborious inquiries of the Lords Committee, on which Lord Lyndhurst's Bill of 1845 was grounded, had removed all doubt as to the fit mode of dealing with the subject. Next year the Government he belonged to again brought forward the plan; but they had very recently repealed the Corn Law, and the zealous adversaries of that measure were joined by its advocates on the Opposition side, in visiting upon

¹ It received great improvement in the Select Committee from the valuable suggestions of the Opposition. On *this* occasion no party spirit was shown in any quarter.

the Charity Trusts Bill the sins of its authors, also the authors of the Corn Law Repeal. It was a great combined party movement, undertaken upon the approved party principle of sacrificing the benefit of a particular measure in order to gain the greater benefit of removing particular men;—a consummation soon after brought about by a similar operation upon another Bill. We may not be entitled, therefore, to blame any one, while we may be allowed to lament the loss which the country sustained, and may, perhaps, feel reconciled to the new order of things, which will probably prevent for some time to come a like evolution of party tactics. Certainly the abuse, and even ribaldry, which assailed those who, unconnected with any party, ventured to support the Bill, somewhat astonished such as myself, who might not unnaturally have hoped to be forgiven if they felt gratified at the adoption by the Government of the plan for which we had been labouring just twenty years. Well, now at least, and at length, we have obtained it; and when I gratefully acknowledge the kind expressions of Lord J. Russell respecting my connection with it, and with the famous Education Committee of 1816 (expressions which I owe chiefly to his friendship), he will, I am sure, forgive me for reminding him that to the same Committee (alas! how few of them survive!) is due, not only the Reform of Charitable Trusts Administration, but the Government Plan of Education; their Report of 1818 having been the origin of this important scheme, and the first grant, that of 1833, having been made distinctly for the purpose of carrying into effect the recommendation of that Report.

“ It is impossible to look forward towards the labours of the next Session in any respect, more especially as regards the Amendment of the Law, without feeling alarm at the increased and increasing load which is cast upon both Houses of Parliament, but especially upon the Commons, and at the growing and the most just distrust in their powers of getting through their business, so as to give satisfaction to the country. The necessity of a change in the system, or rather want of system, as regards the passing of Private Bills (between 13 and 14,000 Sections and Schedules enacted, beside

half as many thrown out, in one Session,) was brought before the Lords in my resolutions of 1846, which propounded a measure for giving Parliament the help it so much stands in need of; and, at the close of the last Session, I urged upon them the consideration of that most admirable plan which the Duke of Wellington had devised in 1834, and which, in the Select Committee of 1837, we had both endeavoured to carry, as more effectual than the new standing orders which I then moved, upon failing to obtain the larger measure. The pressure under which the Commons now labour will probably compel them to adopt some plan for their relief, as I find from a communication which I have had with the Speaker. But it should not be confined to the Private Business; the whole process of legislation must undergo some improvement in order that it may be possible to do the business of Parliament in a manner to deserve the respect and the confidence of the country. A full Report of the Law Amendment Society on this subject was laid before Lord Lyndhurst (then Chancellor) and Sir R. Peel (then Prime Minister) some years ago, and was very favourably received by both. The subject is of most urgent importance. We have a sad example before our eyes of all Constitutional Government being destroyed in a country where it had existed for six-and-thirty years without any attempt to subvert it—destroyed with hardly any regret for its loss, merely because the representatives of the people showed themselves incapable of performing their legislative duties, whether from faction, or from want of system, or from unwillingness to profit by the examples of others, as well as by their own experience. Certainly it is an alarming circumstance, that there have been times of late years when somewhat of the same incapacity has been observable in other places.”

Part of a Letter from Mr. Hill, referred to by Lord Brougham.

“Mainly by your labours the people and the legislature are come to look upon law-making as an experimental science; and it follows, as a corollary from that principle, that the parties to a suit should collectively have an option given to them as frequently as it can safely be introduced, *e.g.*, trial

by judge instead of trial by jury — unlimited jurisdiction — jurisdiction qualified by the agreement of the parties &c.

“The maxim that consent cannot give jurisdiction seems to me foolish and pernicious — the very opposite ought to be the rule; and how inconsistent it is that parties may bind themselves by an agreement to give almost unlimited jurisdiction to a private arbitrator, whose means of enforcing his jurisdiction must necessarily be confined, while the judge or public arbitrator, with ample means of vindicating any jurisdiction confided to him, can receive no jurisdiction by consent except in the few cases provided for by specific enactments.

“Two most important advantages would, I think, be secured by a wide extension of a power to the collective parties to mould according to their own will their own litigation. 1st. The Legislature would learn by watching the course taken by the public, what the public found by experience to be suited to its wants — a result in itself most important as a guide to legislation; law-makers would watch the natural course of the stream, widen or deepen the river, as the case might be, and remove impediments below as the ripple on the surface pointed them out.

“2nd. When a course of proceeding has been the choice of the parties themselves, they feel that they must not complain of results, and consequently justice is more satisfactorily administered than where the line of action is matter of coercion.

“But besides the option given to parties collectively, I am by no means averse from allowing the existing options to plaintiffs to choose their Court to continue. In a good state of the Law, both as to the Code of Rights and the Code of Procedure, the plaintiff would in a vast proportion of cases be in the right, because his chance of success when in the wrong would be very small — his interest would therefore be to choose the best Court *i. e.* the best judge; consequently a continued affluence to a particular judge would furnish to the Government an unerring guide for promotion; and in order to facilitate this result I would take away from the parties collectively all local restraints of jurisdiction — perhaps

even subject to certain regulations regarding costs. An extended power of choosing the judge might be given to plaintiffs without the concurrence of the defendants. This latter suggestion, however, is of doubtful propriety; and I do not insist upon it. But when a judge is chosen by both parties, it is clear that emulation between judge and judge would have the most wholesome effect. Clearness of intellect, mildness of manner, learning, impartiality, and facility of speech, with a due regard to dispatch,—and no more than a due regard to dispatch,—are judicial qualities which are good in themselves, and which will all find their way into the scale when two judges are weighed together for choice.”

ART. X.—THE LAW ON PRIVATEERS AND LETTERS OF MARQUE.

THE mercantile spirit of the age is peculiarly evinced in times of impending war. Not only is the question which gives rise to such a prospect debated on the principles of the counting-house, but those enterprising adventures which were the delight of our ancestors, and from which the nautical character of the nation has been so largely derived, bid fair to be altogether suppressed, by the growing importance of commerce, and the necessity of conciliating the great States with which England is in alliance or friendship.

The practice of privateering, to which we have alluded, took its rise from one of the anomalies of International Law. In that code the usages of maritime warfare differ widely from those of war carried on by land. In maritime warfare private property becomes the property of the capturing State or its officers, while in war by land the private property of individuals is usually respected, and excluded from the subjects of booty. It is another anomaly in the same code, that in wars by land the citizens of neutral States may accept commissions from the belligerent powers, and are entitled to the ordinary treatment of enemies, while in maritime warfare

a neutral who accepts a commission from a belligerent is by many nations regarded as a pirate. But such divergencies of law are inseparable from human jurisprudence. They flow partly from the different nature of hostilities by sea and land, and partly from usages of which the origin is lost in the obscurity of distant ages, though time has matured them into indisputable portions of the public law of civilised nations. In the opinion of Vattel, foreigners taking such commissions as privateers, for the purpose of preying on another nation with which they have no quarrel, are guilty of an infamous practice. But the general law of nations assures to them impunity; however sordid or discreditable may be the motives which actuate their enterprise.

It is now universally agreed that hostilities can be undertaken by none who are not lawfully authorised thereto by the supreme power of the State to which they are rendering service. This does not, of course, prohibit the inhabitants of any country when attacked from defending themselves, but it has been contended, though on what principle of justice it does not appear, that even such would be treated by the enemy with more rigour than those acting under the express orders of their superior.

A privateer is a private ship of war, fitted out at the cost of one or more individuals on their own account, but under the sanction of a belligerent State, against the public enemy. It is the practice of most nations in time of war to issue commissions to armed vessels of this description as auxiliaries to the public force. The owners of them are licensed to attack and plunder the enemy, and their enterprise is encouraged by rewarding them with the proceeds of their captures.

By the law of nations, however, they are not considered pirates.

It is usual for the country on whose behalf they carry on war to take security for their duly respecting the rights of neutrals and allies, and observing generally the law of nations.

In order to encourage merchants and others to fit out privateers or armed ships in time of war, for reprisals against

the enemy, it has been the practice in England at the commencement of a war to pass an Act of Parliament enabling the Lords of the Admiralty to grant commissions to the owners of such ships (see stat. 29 Geo. II. c. 34., and 45 Geo. III. c. 72.); and the prizes captured are divided between the owners and the captain and crew of the privateer. But the owners, before the commission is granted, give security to the Admiralty to make compensation for any violation of the treaties subsisting with those powers towards whom the nation is at peace, and to forbear from employing any such vessel in smuggling (see 24 Geo. III. c. 47.).

Privateers, properly so called, are equipped for the sole purpose of war; but merchantmen carrying cargoes are frequently furnished by the Admiralty with what is called a letter of marque, enabling them to make reprisals against the enemy. But this object is collateral and secondary; and in this respect letters of marque differ from privateers, though in many books, and also in popular language, all private ships commissioned for war are termed letters of marque. Sometimes the Lords of the Admiralty have this authority by a proclamation from the King in Council, as was the case in December, 1780, when they were thus empowered to issue letters of marque against the Dutch. Such commissions, however, are only available against countries at war with England; for if a letter of marque wilfully and knowingly take a ship belonging to a nation at amity with England, this amounts to downright piracy (Molloy, c. 2. s. 23.). But in the case of the "*Sacra Familia*" (5 Rob. A. R. 360.) it was decided by Lord Stowell that a vessel cruising under letters of marque, issued for the purpose of reprisals against one State, is at liberty, on receiving notice of hostilities between her own nation and a third power, to act offensively by reprisals against the latter with as full advantage in the way of prize, and consequently with all such benefits of the law of nations, as if her commission had originally authorised such reprisals.

Letters of marque are only valid during the war, and may be vacated either by the express revocation of the Admiralty, or by the misconduct of the parties, as, for example, by their

cruelty. This appears by the case of the "*Marianne*" (3 Rob. A. R. 9.), where proceedings were instituted on the part of the Admiralty against a privateer to deprive her of her letter of marque. The case arose on a representation made by the master of the captured vessel to Captain Trower, of H. M. S. "*Lark*," that one of two privateers, by which the actual capture was made, had fired into the "*Marianne*" after she had surrendered, and had thereby killed one of her men. Lord Stowell declared the offence to be one of a very atrocious kind, and one which, if proved, would draw with it a forfeiture of the letter of marque. His Lordship, however, considered the evidence imperfect, and therefore dismissed the parties, but stated that the law was laid down by the Prize Act, which expressly inflicted upon all acts of cruelty the forfeiture of the letters of marque. And this the learned Judge considered to be no more than a formal declaration of what was the ancient law of the Admiralty.

"The privateers in our wars," says Sir Leoline Jenkins, "are like the mathematici of old Rome, a sort of people that will always be found fault with, but still made use of;" and great efforts have been made by the United States of America to abolish the practice of privateering, which is the source of so much loss and disaster to a commercial nation. The United States, in their treaty with Prussia in 1785, agreed to employ no privateers in any future war with that country—a stipulation which it seems difficult to consider binding or likely to be observed, in the event of hostilities occurring. It appears, however, that the privateering system was carried to a great extent by the States during the war with England; and the legislature of New York passed an Act conferring corporate privileges, subject to compliance with certain formalities, on every association of five or more persons desirous of embarking in the adventure of privateering (1 Kent's Comm. 96. note).

It is customary for belligerents at the commencement of war to notify to neutral powers the existence of hostilities, and thereupon the neutral governments issue proclamations to their own citizens to apprise them of the notification, and to caution them against interfering in the contest. Such

prohibitions, however, being obviously too weak to restrain the adventurous spirit which is awakened by the occurrence of war, the Government of the United States, at the commencement of the war with Mexico, appear to have been seized with an expectation that British ships and seamen would cruise under the Mexican flag against the ships and commerce of the States, and a proclamation or notification was published to intimate that all neutrals found so serving would be dealt with as pirates, by summary execution. Whether there was any just ground for the apprehension to which we have alluded, or whether the notification quashed all attempts of the kind, it is difficult to say. But there is no evidence of the Mexicans having invited the acceptance of letters of marque from their government, and the subject was never particularly mooted during the contest between the United States and Mexico. A question of some difficulty would have occurred if a British seaman had been thus summarily put to death, but for the Municipal Law of England having rendered all such expeditions illegal by express enactment. (See 59 Geo. III. c. 69.) And in the case of any subject of Great Britain deliberately embarking on such an enterprise, in direct defiance of the laws of his own country, the British Government would probably have had no right to make any interpellation in his favour. We have not met with any instance in illustration of this point, except in a matter of civil right arising out of a participation in a foreign expedition not sanctioned by the Government; and from this it appears as one consequence of the prohibitory enactments of the statute 59 Geo. III., that the Courts of Justice render no assistance for the recovery of any pay or advantages which may have been promised to the participators in unauthorised expeditions for warlike purposes. The case was that of the "Leander" (1 Edwards, A. R. 30.), one of the ships employed in the expedition against Spanish America under General Mina. James Minns, one of the crew, had volunteered at St. Domingo to join the military part of the expedition, and had listed as an artilleryman, upon an agreement that seamen volunteers should cease to be considered as belonging to the crew, and should receive a quarter of a dollar

per day and a gratification of prize money, with an allotment of land in case the expedition succeeded, but not otherwise. On first embarking he had received a month's pay in advance; and as the military expedition had failed, he commenced proceedings in the Court of Admiralty against the ship for the recovery of his wages. But the Court held, not only that his engagement as a seaman had terminated by his own agreement to serve as a soldier, but that as the ship had been fitted out on an illegal adventure, that circumstance alone was a legal bar to the claim.

To quell the alarms of those who apprehend that in the event of war breaking out between England and Russia upon the Turkish question, the commerce of England would be harassed by vessels of the United States of America carrying Russian letters of marque, it is right to notice that the laws of the United States entirely correspond with those of England on the subject of foreign enlistment. They not only forbid the equipment in ports of the United States of privateers destined to cruise against the commerce of nations with which that country is at peace, by compelling a suspected vessel to give bonds in double the value of vessel and cargo, but they also punish all proved to have been guilty of any such intention by fine and imprisonment. The late Chancellor Kent, in his "*Commentaries*," p. 122. vol. i. of the edition of 1840, thus describes the laws of the Union in relation to privateering:—

"It is declared (by statute) to be a misdemeanour for any citizen of the United States, within the territory or jurisdiction thereof, to accept and exercise a commission to serve a foreign prince, state, colony, district, or people, with whom the United States are at peace; or for any person, except a subject or citizen of any foreign prince, state, colony, district, or people, transiently within the United States, or any foreign armed vessel within the jurisdiction of the United States, to enlist or enter himself, or hire, or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district or people, as a soldier, or mariner, or seaman; or to fit out and arm, or to increase or augment the force of any

armed vessel, with intent that such vessel be employed in the service of any foreign power at war with another power with whom we are at peace; or to begin, or set on foot, or provide or prepare the means for any military expedition or enterprise, to be carried on thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom we are at peace, or to hire or enlist troops or seamen for foreign military or naval service; or to be concerned in fitting out any vessel, to cruise or commit hostilities against a nation at peace with us; and the vessel in this latter case is made subject of forfeiture." . . . In the case of the "*Santissima Trinidad*" it was decided "that captures made by a vessel so illegally fitted out, whether a public or private armed ship, were torts, and that the original owner was entitled to restitution if the property was brought within our jurisdiction."

It may be well to add, that the laws of which Chancellor Kent gives the preceding synopsis expressly punish by fine and imprisonment any citizen of the United States found on board of letters of marque cruising against the commerce of a neutral power, or who shall have the jurisdiction with the intent of being so employed; and there is no reason to doubt that these laws would be executed with the fidelity becoming to a great nation.

It may not be inappropriate to conclude with the moral view of the subject under the shadow of a great name. At the time when Franklin was engaged in negotiating the peace of 1783, between the United States and England, he communicated to Mr. Oswald, the British Commissioner, the following sentiments on privateering:—

"It is for the interest of humanity in general that the occasions of war, and the inducements to it, should be diminished. If rapine is abolished, one of the encouragements of war is taken away, and peace, therefore, more likely to continue and be lasting. The practice of robbing merchants on the high seas, a remnant of the ancient piracy, though it may be accidentally beneficial to particular persons, is far from being profitable to all engaged in it, or to the nation that authorises it. In the beginning of a war some rich ships, not upon their guard, are surprised and taken. This encourages the first adventurers to fit out more armed vessels, and many others to do the same. But the enemy at the same time be-

comes more careful, arm their merchant ships better, and render them not so easy to be taken; they go also more under the protection of convoys. Thus while the privateers to take them are multiplied, the vessels subject to be taken, and the chances of profit are diminished, so that many cruises are made wherein the expenses overgo the gains; and as is the case in other lotteries, though some have good prizes, the mass of adventurers are losers; the whole expense of fitting out all privateers, during a war, being much greater than the whole amount of goods taken. Then there is the national loss of all the labour of so many men during the time they have been employed in robbing, who besides spending what they get in riot, drunkenness, and debauchery, lose their habits of industry, are rarely fit for any sober business after peace, and serve only to increase the number of highwaymen and house-breakers. Even the undertakers who have been fortunate are by sudden wealth led into expensive living, the habit of which continues, when the means of supporting it cease, and finally ruins them; a just punishment for their having wantonly and unfeelingly ruined many honest innocent traders and families, whose subsistence was obtained in serving the common interests of mankind.”¹

So also in 1785, in a letter to a private friend, Franklin says:—“The United States, though better adapted than any other nation to profit by privateering, are, so far as in them lies, endeavouring to abolish the practice by offering, in all their treaties with other powers, an article engaging solemnly, that in case of a future war, no privateer shall be commissioned on either side, and that unarmed merchant ships on both sides shall pursue their voyage unmolested.”²

ART. XI. — THE LAW REFORMS OF THE NEXT SESSION.

1. *Report from the Select Committee on the Registration of Assurances Bill, with the Proceedings of the Committee.* 1853.
2. *A Letter to the Right Hon. Lord John Russell on the Transfer of Landed Property.* By ROBERT WILSON. 1858.

¹ Wheaton's International Law, p. 308.

² Franklin's Works, vol. ii. p. 448.

3. *On the Reform of the Law of Real Property, in a Letter to the Right Hon. Lord Lyndhurst.* By H. B. KERR. 1853.
4. *Draft of a suggested Bill to facilitate the Transfer of Real Estate, and for the complete Registration of Assurances thereof.* By JOHN FAWCETT, Esq. Carlisle : 1853.
5. *Observations on the Remuneration of Attorneys and Solicitors.* By REGINAL PARKER. 1 vol. 1853.

It may now be well to consider in what way the reasonable expectations of the public as to further reforms in the Law may be safely and properly gratified. This has now become a matter so important, that we shall look out for the budget of the Lord Chancellor with as much anxiety as for that of Him of the Exchequer, as he is elsewhere called. Each step that we take, in fact leads us to a higher point, and we are now able to see more clearly, and to take a wider view of all that is to be done. What, indeed, is more especially wanted, is the true appreciation of the occasion and the proper adjustment of the means to the great end to be obtained,—the complete Amendment of the Law in all its branches.

First, then, let us turn to the subject which has already occupied so much of our space—the registration of dealings in land; and as to this, we have heard some disappointment expressed that no Act has yet been passed effecting a settlement of this question, and more especially as a Bill on this subject was introduced last Session by the Lord Chancellor, and passed the House of Lords without opposition. We think, however, that a little consideration will show that much real progress has been made, and that the Committee of the House of Commons, although it did not give its assent to that Bill, has greatly advanced the real interests involved. This Committee, in which were found collected all the members the best qualified to come to a sound conclusion, were engaged in considering a plan, the chief points of which have been repeatedly brought before our readers, and which is of the highest importance if it can be carried into effect.

Speaking of the Lord Chancellor's Bill, the Report says,—

“Your Committee find that the Bill contains within itself two

distinct principles of registration : one, contemplating the registration of all assurances in any manner relating to land and the legal or equitable estates and interests therein ; the other proposing that the legal title alone shall be entered on the registry, and that there shall be no necessity to register the instruments which declare or transmit the beneficial interests or equitable ownership. The two other Bills which have been referred to your Committee, proceed upon a principle similar to that contained in the first Bill, viz. the principle of keeping the registered ownership wholly separate and apart from the equitable right or title.

"Your Committee, pursuing this idea and confining their attention to that principle, have examined some witnesses of high professional reputation, and had brought under their notice a scheme for the registration of 'Title,' or of 'Legal Ownership,' which, if it can be fully developed and made capable of easy practical operation, would appear to your Committee to fulfil the most important conditions of registration, and to afford the means of ensuring great facility for the transfer of land, combined with great simplicity and security of title.

"It has not been possible for your Committee, at so late a period of the Session, to extend their inquiry into all the details of this scheme, so as to present it in an embodied form, or to feel confident that they have ascertained all the difficulties which may attend its practical operation. They consider it worthy of further and more careful attention, and they are of opinion that registration will be practicable and useful if effected upon this principle. Your Committee therefore recommend the House not to proceed with the Bill for the Registration of Assurances ; but suggest the immediate appointment of a commission for the purpose of considering the subject of registration of title, with reference to facilitating the sale and transfer of land, in order that a Bill for effecting that object may be brought into Parliament at the commencement of the next Session."

We have here a most important principle recognised, which our readers will remember as that first advocated by Mr. Robert Wilson, and then chiefly with his assistance by a Committee of the Law Amendment Society¹, and afterwards by Mr. Cookson, in an able paper², and which has been from time to time explained and enforced by other writers in this Review ; and to these various papers we must

¹ Report printed, 4 L. R. p. 351.

² Printed, 16 L. R. p. 361.

refer those who wish to investigate the subject. We have always wished to connect this scheme of Registration of Titles with an Insurance of Titles; and this view, we are happy to say, seems also to have been favourably received by the Committee. In the paper brought before them, written by Mr. Bullar, and which was the groundwork of the proceedings of this Committee, we find this distinctly proposed.

“ 51. Such a system of registration as is slightly sketched out by the suggestions preceding No. 82. would, in the course of, in most cases, about sixty years, make the register and the registered owners' single title-deed the only muniments of title affecting the registered ownership. As time passed on, the period before registration for which the earlier title would have to be investigated would be proportionably shortened, and, after about sixty years, it would rarely be requisite to investigate the earlier title. But that period might well be anticipated if the suggested NATIONAL WARRANTY OF TITLES were established.

“ 52. An insurance of titles is part of the scheme of at least one existing joint stock company; but the operations of any company must necessarily be limited by the amount of its capital, or of the value which landowners may be disposed to place on the security which it can effect. However respectable and responsible any number of title-insuring companies might be, it may be safely predicated that a general warranty of titles could only be effected by the nation.

“ 53. The suggested warranty of titles has the advantage of precedent in its favour. Such a warranty has already been sanctioned by both Houses of Parliament, and is part of the law of the land.

“ 54. See, for a precedent, the Act of 5 & 6 Vict. c. 94. ss. 5 to 15., both inclusive, by which a national warranty of lands sold by the principal officers of the Ordnance is established.

“ 55. ‘A parliamentary title,’ such as is conferred under the Incumbered Estates Court in Ireland, is only a guarantee against claims existing at the time of the sale. The title to an estate bought in that court might, in the course of a few years, become so complicated as to require a second purification by being sold again in that Court. The suggested warranty would be free from that objection.

“ 56. Without the proposed warranty, the suggested or any other scheme of registration would probably be found to be of such

slight immediate value to landowners, as either to render Parliament comparatively indifferent to the passing of an Act to establish it, or to induce comparatively few to avail themselves of the prospective advantages held out by it.

" 57. With the proposed warranty, the certainty that the value of land would be enhanced to an owner by at least somewhere about the difference between the price paid by a purchaser and the net balance of it realised by the owner, after the deduction from it of his own and the purchaser's costs, would, it is probable, be a sufficient temptation to insure the adoption of the plan and its being acted on.

" 58. The cost of obtaining the warranty, irrespective of the premium, would be the cost of investigating the title once for all. The small premium suggested would perhaps be found more than need be charged.

" 59. The suggested mode of investigating the title on behalf of the registrar, is the mode which long experience points out as being sufficient for the protection of capitalists. A Court for the investigation of titles would not only be a novelty, but a costly novelty; and, after all, it would not afford any real additional security. When trustees lend money under the authority of the Court of Chancery, they do so, in the great majority of cases, on the opinion of a single conveyancing barrister.

" 60. There would, however, be cases where the person seeking the warranty disputed the accuracy of the opinion taken by the registrar. When this happened, the point in dispute might be submitted, as 'an *A. B.* case' for the sake of privacy, to a Court of Law or Equity.

" 61. It might be expedient that there should be separate indexes of warranted properties, and the owners of warranted properties; but this is a matter of mere detail, to be decided by the balance of convenience for or against multiplying the indexes.

" 62. It might be objected that the effect of the warranty would be to deprive persons, through the means of an *ex-parte* examination of the title to property in which they were interested, of their interests in the property, and to convert those interests into a right to a mere money compensation.

" 63. It must be granted that there would be a risk, notwithstanding all the suggested precautions, of some interests in the property, not discovered on the investigation of the title, being so far defeated: but that risk would not be a valid objection to the scheme. Under our present system of Real Property Law, where

a purchaser does his best to ascertain the exact state of the title, and obtains the discharge of every incumbrance of which he has express or implied notice, the cases are very few in which the undiscovered interests are not absolutely defeated by the completion of his purchase. Under the proposed plan, every undiscovered interest would be compensated for in money; and, on the whole, it would be better for undiscovered incumbrancers that every one of them should have a claim for money compensation, than that some few should retain their rights to the property in specie, and the rest should lose their rights altogether."

Our readers will find proposals similar to these in the Report on Insurance of Titles¹, and enforced from time to time in these pages. The remarkable fact is, that at length they are admitted by eminent conveyancers; and an assurance of titles by the State is proposed and advocated as the only mode of solving the difficulties now attending the transfer of land. We cannot but rejoice in this; and on all these occasions any vain-glorious or selfish feeling that our own views have been adopted is lost, we trust, in the conviction that we entertain of the great benefit which the community will derive from the measures proposed. On these occasions,—and here we more particularly address ourselves to Mr. Wilson,—the Law Reformer has frequently to see his darling project borne away and claimed by another, who takes the whole credit of having brought it forth; but, like the true mother, the Author will prefer the welfare of his offspring, and if it is only doing well, he is content to see the paternity adjudged to another. Let us trust, however, that in the proper time some Solomon may arise with sufficient discernment and information to proclaim the real parents.

As it is, we are for the present satisfied that the true principles with respect to this great question are now fairly before the Public; and recommended as they are in this Report by persons so influential and well-informed as the Solicitor General, Mr. Lowe, and Mr. Headlam, supported by Mr. Henry Drummond and Mr. Evelyn Denison.

On another very important point connected with this subject much progress has also been made. A territorial

¹ Printed, 7 L. R. p. 155.

map, on a scale sufficiently large for registration purposes, may now be considered as determined on by the Government; and we are much pleased to find that the views of the same Committee which reported on Registration of Titles, and on Insurance of Titles, have been recognised, and here the proper source is recognised.

In the memorandum contained in the Blue Book on the Ordnance Survey, by Mr. Charteris, (now Lord Elcho) submitted to the Treasury, this Report is quoted with approbation, and a full reference is made to its recommendations. Not the least important statement in this Report is the one which estimates the expense of such a map at 645,000*l.*; and Mr. Charteris concludes, that "it appears that a map, on the scale of twelve inches to the mile, which could be applicable for all those civil purposes to which reference has been made in the Report of the Committee of the Law Amendment Society¹, might be completed and published at a cost so trifling in comparison with the public benefit to be derived from the survey, as fully to justify such expenditure."²

As this recommendation comes from a Lord of the Treasury, and is made to the Chancellor of the Exchequer, who has directed the whole correspondence to be laid before Parliament, we conceive that the construction of this map may be considered as resolved on by the Government. Thus we have proposed from the highest authority,—

1. REGISTRATION OF TITLES.

2. STATE INSURANCE OF TITLES.

3. STATE TERRITORIAL MAP.

And on all these matters we shall look for progress next Session.

But as to these we would invert the order of precedence. Before Registration of Titles is attempted, we should like to see a good map constructed; and as to a large portion of the country this would not be a very long work if existing

¹ Printed, 5 L. R. p. 385.

² Correspondence on Ordnance Surveys, 1853, p. 24. These views were also acknowledged at the Statistical Conference at Brussels, held at the end of last September, and were well represented by Colonel Dawson, R. E., who mainly assisted in drawing up the Report of the Law Amendment Society. It should be stated that the scale now recommended is 26½ inches to a mile.

materials were rendered available, as was shown in the Report of the Law Amendment Society already referred to, and since this was published much further mapping has taken place. A good system of Insurance of Titles might well proceed *pari passu*, either in direct connection with the State, or by means of some fitting machinery sanctioned by the Government; and these things once accomplished, we should be better prepared to effect and complete a Registration of Titles. One step to this, and one which might be safely, and in many parts of the country easily taken, will be a *registration of owner-ships*; and this we earnestly recommend to the notice as well of Government as to those who have considered the subject. The process is well suggested by Mr. Wilson in his opportune Pamphlet: taking the parish of Graveney, by way of example, the proposed proceedings are thus described:—

“Let it be supposed, then, that we adopt the Graveney tithe map, annexed on a reduced scale, with a book of reference to it, containing the numbers, as on the map, with description and contents of each number, and with blank columns for the names, addresses, and descriptions of the freeholders, and the dates of provisional registration; to which, if thought fit, a column for values might be added; but I shall not incur this letter by entering into the question of valuation.

“There must be a ‘Land Register Office’ in London, consisting at first of a large room for the county of Kent, divided, as in the annexed plan, into eight compartments for parish business, alphabetically distinguished, like the compartments in the transfer offices at the Bank of England; with a ninth compartment for general county business.

“After a suitable notice, an Assistant-Registrar would go down from the London office to the parish of Graveney, for the purpose of registering the names of the freeholders of the lands contained in that parish. He would hold meetings, and receive claims, and would, in the occasional, but I should hope not very frequent, case of conflicting claims to the freehold, ascertain by evidence who was the freeholder *de facto*, and enter his name, subject to appeal. He would, in substance, follow the practice laid down by the General Inclosure Act, 8 & 9 Vict., cap. 118, 46th and following sections; the marginal notes of which would, if the words ‘Assistant-Registrar’ and ‘Registrar,’ were substituted for the words

'Valuer' and 'Commissioner,' run thus; '*Assistant-Registrar to hold meetings:*' '*Claims to be delivered in writing:*' '*Statement of claims to be deposited for examination:*' '*Claims to be heard and determined by Assistant-Registrar, subject to appeal to Registrar:*' '*Titles not to be determined by Assistant-Registrar or Registrar.*'

"This last is the marginal note of the 49th section, which expressly adopts our proposed principle of registering the possession, by providing that nothing in the Act contained 'shall extend to enable the Valuer, or the Commissioners, or any Assistant-Commissioner . . . to determine any right between any parties, contrary to the actual possession of any such party.'

"The Assistant-Registrar would take down with him a printed copy of the Book of Reference, with the numbers and descriptions of the lands already filled in, and with blank columns for the names, addresses, and descriptions of the freeholders, and the dates of provisional registration. These particulars would be added by the Assistant-Registrar; and the Book of Reference would be returned by him to the London office, complete as annexed; the Roman letters showing the original printed form, and the Italics showing the additional matter supplied by the Assistant-Registrar. The smallness of the type has made the lines a little indistinct, but this, of course, would not be the case in practice.

"The Book of Reference, thus completed, would be the commencement of the register. A person desirous of appealing against a decision of the Assistant-Registrar, would be allowed some very short time, say a fortnight, to register in London his claim to the freehold: which claim might be brought before the Chief Registrar, either by the claimant, upon a summons to cause why his name should not be substituted for that of the registered freeholder; or, (if the claimant did not take out this summons within a week after the entry of the claim,) by the registered freeholder, upon a summons to show cause why the registered claim to the freehold should not be discharged. The registrar would confirm the existing registration of the freehold, or alter the register by putting the freehold into the name of the claimant; and in either case, the unsuccessful party might bring an action in one of the courts of law, by way of appeal from the Registrar, as already explained; when a copy of the writ by which the action was commenced would be registered, as a qualification of the registered freehold."

GRAVENEY, KENT BOOK OF REFERENCE.—SURVEY OF 1857.

(Adapted from the Appendix to the First Report of the Registration and Conveyancing Commissioners.)

No. on Map.	Description.	Contents.		Date of Provisional Registration.	Name of Freeholder.	Address of Freeholder.	Description of Freeholder.
1	Field	A. 64	F. 2	1 May, 1857	John Jones	Graveney	Farmer
2	Ditto	23	2 22	"	"	"	"
3	Ditto	-	1 39	"	"	"	"
4	Ditto	-	3 16	"	"	"	"
5	Ditto	-	5 0 86	"	"	"	"
6	Ditto	-	14 0 8	"	William Wilkinson	Maidstone	Tanner
7	Ditto	-	14 3 19	"	"	"	"
8	Ditto	-	14 3 36	"	"	"	"
9	Ditto	-	14 1 25	8 June, 1857	John Jones	Graveney	Farmer
10	Ditto	-	11 2 11	1 May, 1857	"	"	"
11	Ditto	-	18 1 38	"	"	"	"
12	Ditto	-	18 0 15	"	"	"	"
13	Ditto	-	14 3 32	"	"	"	"
14	Ditto	-	27 0 21	"	"	"	"
15	Ditto	-	0 1 19	"	"	"	"
16	Ditto	-	23 2 8	9 June, 1857	"	"	"
17	Ditto	-	13 3 26	1 May, 1857	"	"	"
18	Ditto	-	20 0 39	"	"	"	"
19	Cottage and Yard	-	0 0 27	"	"	"	"
20	Garden	-	0 1 36	"	"	"	"
21	Field	-	7 3 1	"	"	"	"
22	Ditto	-	2 3 1	"	"	"	"
23	Ditto	-	5 0 27	"	"	"	"
24	Ditto	-	6 3 14	"	"	"	"

And so on.

We suggest this mode of proceeding because it would be attended by no difficulty that could not be easily overcome. The other portion of Mr. Wilson's proposals may or may not be well-founded—we have already given *our* opinion as to this,—but this is obviously useful, and would lay a good foundation. A similar proceeding has already been successfully adopted in the analogous matters of Tithe-Commutation and the Inclosure of Commons, and we cannot doubt that it would be equally successful if applied merely to *ownerships*. Out of such an inquiry would spring an easy mode of dealing with at least nineteen-twentieths of the whole land of the kingdom, and we might then safely take such further steps as should appear advisable. This then is open to us; and that we are not already in possession of it we can only deplore. As to this we owe little obligation to the Registration Commissioners. These suggestions, both as to titles and insurance of titles, were brought before them; and we have now an admission by one of them (Mr. B. Ker), that the terms of the Commission did not allow the Commissioners to report as to any matter but a Registration of Deeds. Surely it would have been better for the Commissioners to have applied for an extension of the terms of their Commission rather than come to a conclusion short of the necessity of the case; and yet we shall find that Lord Langdale, as the head of the Commission, thought it better to confirm the Report within particular bounds, on what appears to us the absurd ground that the terms of the Commission would not admit of an inquiry into the whole state of the case. This surely was as technical a view of the duty imposed on the Commission as ever existed in a pleader's brain; and yet this has deferred, for nearly ten years, the proper solution of this question.

“When the Commission was issued for considering ‘whether the burdens of land might not be reduced by a system of registration of deeds, and by the adoption of short forms in conveyancing,’ as *I was a Commissioner* I had hopes that a complete system of Law Reform might then be considered and propounded; but the whole matter ended with a report in favour of registration, doing little more (except the suggestion of an improved plan of registra-

tion) than had been done more than twenty years ago by the Real Property Commissioners.

“As regards the general question, after much discussion, Lord Langdale decided, that the terms of our authority did not warrant the entering on the consideration of anything beyond that of short forms of deeds; and after some ineffectual inquiries on this head, we seemed to be agreed that the subject should be abandoned; and no report was made.” (*Ker*, p. 2.)

And again,—

“I now come to the consideration of the evils which may be said to arise out of defective expressions in contracts or other instruments, and the nature of those instruments by which property is disposed of—in fact, as to whether the great cost and delays of the transfer of property are not to be referred as much to the length of conveyances as to the state of the law itself. This was one of the subjects to be considered by the Registration Commissioners, but the entering on which was, as I have before stated, abandoned by us, on account of the narrow terms of the commission, which did not warrant any general inquiry into the existing state of the law; and without doing this, the subject could not be satisfactorily considered.” (*Ker*, p. 72.)

So that the learned Commissioners, on the showing of Mr. Ker, were content to recommend, as a final settlement of this question, a measure which confessedly was grounded on a partial and limited consideration of the subject.

We are glad to find, however, that although they did not express it in this Report, the Commissioners thought that something ought to be done as to titles.

“What I have proposed, both as regards the shortening of the mode of transfer and the simplification of the Law itself, mainly relates to the future, and little immediate benefit as regards existing titles is to be expected from these remedies; but I think much may be done with respect to present interests, so as to facilitate the deducing of titles and diminish the present cost. I assume that a clear exposition of the law has been attained, and that a complete system of registration of all instruments affecting interests in land has been established, and thus the evidences of title rendered positive instead of negative. Means might be devised, either by some judicial proceeding or otherwise, of putting a title on the registry; and such, I think, was the impression of

the Registration Commissioners. Again, much benefit would be derived from a revision of the Statute of Limitations, and making its provisions more stringent, and shortening the term for pursuing claims. If, indeed, there were only estates in fee simple to be dealt with, little difficulty would arise with respect to an alteration of the law as to barring stale claims; but where estates may be limited for life in succession, and extended to a long series of heirs, it is necessary to take care that the interests of those in remainder should not be prejudiced by the neglect, fraud, or collusion of the party in possession. As regards the law limiting the time at which a party shall be precluded from pursuing his right, Lord Plunket eloquently observes, 'that if time destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights, and in the other hand the lawgiver has placed an hour-glass, by which he metes out incessantly those portions of duration which render needless the evidence which he has swept away.'

"In former times the laws for enabling parties to bar all claimants were unnecessarily stringent in certain cases. A fine levied, and proclamation made in open court, at the end of five years barred all claimants. I would not recommend the re-adoption of a measure which worked in many cases an injustice; yet I think means might be devised, either by a system of notice or some judicial proceeding, by which an absolute title might be acquired within a period much shorter than is at present allowed. I think that, assuming an instrument is put on the registry showing a *primâ facie* title, that then, after a time, and subject to some public advertisements, this should held, like a fine, to be an absolute bar. In great alterations, some such stringent measure has been before resorted to; as, for instance, when the right as to the recovery of tithes was restricted, and the Law of *nullum tempus occurrit ecclesiæ* altered, there was a provision that, unless suits within a given time were instituted by parties claiming, they should be bound by the new law. No great alteration of this kind can be effected in a system of Law so complex as that now existing, without some possible injury; but I think in this, as in all other cases, the balance of good is to be taken into consideration as against the supposed possible injury to some particular class. In making this suggestion, I wish to state explicitly that I am in nowise blind to the difficulties attending the working out what I propose. On

the whole, I firmly believe improvements might be devised which would mitigate the evil and work little injustice ; and in all cases of difficulty this might be met by following the example of the Irish Encumbered Estates Act. It will be observed that this very course has been followed in many cases, and with excellent results. In the construction of railways, canals, &c., where parties are not able to make a title, or the owner not known, the land is valued and possession taken, and the price paid into Court, and the claim to the property thus transferred *from the land to the money* ; and hitherto, I have not in my practice heard of any injustice being done, or indeed any very complex or difficult suit arising out of any such proceedings. Again, where parties have not a power to sell to railway companies and other similar bodies, by reason of the property being in settlement, the purchase-money is paid into the Court of Chancery, and laid out in purchase of other lands to be similarly settled ; and thus again the title is transferred to the money. That some such measure as this must be devised, to avoid the difficulties and delay in the making out titles under the present state of the law, I am satisfied." (*Ker*, pp. 85—88.)

Here then, we believe, we may look forward to the next session as likely to aid us ; and we think it is generally admitted that we are on the eve of changes in this department, of a very extensive character. Our own information justifies us in confirming the statement of Mr. Ker in this respect.

" I have an opportunity of seeing the opinions of Mr. Christie, Mr. Hayes, and Mr. Jarman, on the question of ' Registry or no Registry ;' and which I understand was written for the purpose of being submitted to the Select Committee of the House of Commons. Mr. Christie observes : ' That any system of documentary title was necessarily imperfect without registration ; that instruments should be registered at length ; and that a central office was more likely to be well managed than a set of local offices : but that he was clearly of opinion, that at the present time, when we are probably on the eve of very extensive changes in the law, it would be highly inexpedient to pass *any* register bill ; for, however well adapted to the system of to-day, it might be wholly inapplicable to a system which might be soon in operation.'

" Mr. Hayes, without giving a decided opinion in favour of any registration, considers that the present state of the law requires remedies more searching and less elaborate, and that if there is to

be a registry, it should be preceded by a large and sweeping preparatory measure.

“ Mr. Jarman is, as far as I collect, also opposed to any registry, at least at the present time ; but conceives that much may be usefully done to facilitate alienation.

“ I admit it is a grave question as to whether registry should be the first step in reform, or the last. When I joined in framing the Report of the Registration Commissioners, I inclined strongly to the revision and simplification of the law, before adopting registration ; but the rest of the Commissioners thought otherwise, and so did the Real Property Commissioners — all considering registration as the key-stone of all reform. I refer to the opinion of these gentlemen — not with reference to their notions as to registration — but as showing that they, as well as myself, are satisfied that the time is come for a change ; and be it observed, they are all persons of great experience, and are three out of the six selected by Lord St. Leonards to assist the Court of Chancery in advising on the titles to estates purchased under the sanction of the Court.”

Mr. Ker further proposes, that we should take steps to compile a Digest of the whole of the law of property, and uses some of the reasons long ago familiar to our readers in this respect. This proposed Digest, we need hardly say, has our approbation ; and in all these matters, although it would seem that in many cases the true light has taken a long time to travel, yet we hail the fact that it appears to have at length reached all quarters.

Another point for which we have incessantly laboured, is some alteration in the mode of professional remuneration ; and here we appear to have gained the assistance of the class who at one time were the most hostile — the Solicitors. They are at length satisfied that some great alteration is necessary, and have applied to the Lord Chancellor on the subject. In the last Annual Report of the Council of the Incorporated Law Society, printed in the “ Legal Observer ” for September 3rd last, a full statement is given on this subject, and it concludes with the suggestions laid before the Lord Chancellor, submitted by the Council, which are as follow : —

“ 1. That in revising the scale of fees, regard should be had to the actual skill and labour employed and responsibility incurred,

and that a fair and moderate fee should be fixed as a minimum for each item or head of business, and be applicable to the ordinary description of business falling under that head.

"2. That for certain descriptions of business which are specifically referred to in the statement laid before the Chancellor, but which may be described in general terms as involving mental labour and personal responsibility as distinguished from merely mechanical employment, the fees to be ordinarily allowed should be increased at the discretion of the Taxing Masters.

"3. That in the taxation of solicitors' costs, the Taxing Master should be directed to consider, and should be at liberty to give effect to any special agreement for remuneration which may have been entered into *bonâ fide* between competent parties in respect of all or any part of the business done.

"4. That the exercise of the Master's discretionary powers with reference to matters falling within the application of the principles Nos. 2. and 3., be in all cases subject to the revision of the Court."

The only novelty as to the sentiments here expressed, is the finding them in the Report of the Law Society; but we are quite satisfied so long as they are there. In the same sense the Pamphlet of Mr. Parker, a respectable solicitor, may be perused with advantage. "It is true," he says (p. 12), "that the 8 & 9 Vict. cc. 119, 124, contain provisions that in taxing any bill for preparing and executing deeds under the Act, the Taxing Master should consider not the length of such deed, but the skill and labour employed, and responsibility incurred. But *this effort in the right direction* is too partial to be of any benefit." Thus we have at length a solicitor calling for an extension of the principles of these Acts! Here, then, we may also expect some alteration of the law next Session.

Another principal feature in the discussions of the next Session, will doubtless be the measures which will arise out of the labours of the Law Commissioners recently appointed. Those have all been appointed, as we are informed, on the understanding that they are to report in such time that their recommendations may be acted on during the approaching Session. Let us, then, consider what these Commissions are, and what may reasonably be expected from them.

The first appointed was the Statute Law Commission. This rests on the letter of the Lord Chancellor to Mr. Gladstone, of the 28th February last, and the other correspondence printed 18 L. R. 433—437. The Commissioners are, Mr. B. Ker, Mr. Anstey, Mr. Rogers, Mr. Coode, and Mr. Brickdale. Their duty is to examine and report as to the existing Statute Law; to make special and detailed reports of all the repealed, expired, and obsolete statutes; and then to devise a plan for a systematic arrangement of the existing Statute Law according to subjects, and to make a Digest. In another part of this Number will be found some notice of the labours of these gentlemen. No one can complain of the want of industry of the junior Commissioners. It remains to be shown that the gentleman called in these papers the Head Commissioner has done anything at all, or is, in fact, adequate to direct the proceedings of the others. He has not been sparing in his censures of the legislative efforts of others, and has placed his own position in an imposing light, endeavouring in proportion to his depreciation of others to exalt himself. We have only to observe as to this that he has been for many years a drawer of Bills in connection with the Government, and that we cannot remember one Act of any importance which is favourably connected with his name, while those which have been associated with it have not tended to give his professional brethren the highest confidence in his attainments, either as a lawyer or a draftsman. We say this with the less hesitation of Mr. Ker as he has criticised, in unsparing terms, many recent Acts, including those drawn by Mr. Brodie and Lord St. Leonards, blackening the labours of others and gilding his own. This much it is our painful duty to remark in justice to the subject and with reference to the evil that may ensue from his present position, to which we consider any one of the junior Commissioners is far better entitled.

The second Commission, composed of Sir T. B. C. Smith, M. R. Ireland, Sir C. Cresswell, Lord Curriehill, Mr. Bramwell, Q. C., Mr. Anderson, Q. C., Mr. K. Hodgson, Mr. Bayley, and Mr. Slater, and they are appointed Her Ma-

justy's Commissioners for inquiring into the expediency of assimilating the mercantile laws of the United Kingdom.

This Commission was appointed in consequence of the representations of the conference held at the rooms of the Law Amendment Society, in October, 1852, and we believe that the Commissioners have already had several meetings, chiefly to consider the question of partnership *en commandite*. It is obvious that in order to represent on the Commission the various interests required, and more especially the lawyers of the three kingdoms, it was necessary to select persons who must reside in different parts of the empire, and this must be attended with the disadvantage of less frequent complete meetings than may be desirable. But we shall look with interest on the Report coming from (not to name the others) lawyers so able and eminent as the Irish Master of the Rolls (a true Law Reformer), and Mr. Justice Cresswell, and merchants so intelligent and judicious as Mr. K. Hodgson and Mr. Slater.

The third Commission consists of Mr. Spencer Walpole, Sir George Rose, Mr. Swanston, Q. C., Mr. M. D. Hill, Q. C., Mr. Bacon, Q. C., Mr. Commissioner Holroyd, Mr. Cooke, and Mr. Glyn, and these are Her Majesty's Commissioners "For Inquiring into the Law of Bankruptcy." This Commission has our complete approbation, and the selection is praiseworthy. We know of no one better qualified to preside than the chairman, Mr. Walpole, who to clear and statesmanlike joins practical views and great amenity of manners. We find also able lawyers and leading advocates, and a proper admixture of law reformers, while the best class of mercantile men is represented in Mr. Glyn.

The fourth, and undoubtedly to our mind the best, is the Commission which is composed of the following persons:—Sir John Romilly, M. R., Mr. Justice Erle, Mr. Justice Crompton, Mr. Fitzroy, M. P., Mr. Keating, Q. C., Mr. Koe, Q. C., Mr. Serjeant Dowling, Mr. Pitt Taylor, and Mr. Mullings, and they are to be Her Majesty's Commissioners for inquiring into the state and practice of County Courts.

This Commission is admirably composed, especially for the object in view; and we shall look to them for a procedure

which will effect the real ends of justice. The fusion of Law and Equity in the County Courts will flow obviously from their deliberations; and if it works well in the County Courts, surely it cannot be denied to the Superior Courts. But a duty more urgent even than the inauguration of this great truth is to be performed by this Commission—we mean the ascertaining of the exact province and boundary of provincial justice. A great metropolitan jurisdiction there must always be in this country, but it must be confined to its proper limits. What can best be done in London, and what best in the great provincial towns, and what best in the smaller towns,—this is what we expect to be told by the County Court Commissioners. How justice can be carried most effectually to the remotest part of the country—how the County Courts can be made ancillary to the central administration of justice—what can best be dealt with in the Superior Courts, what best finally decided in the County Courts, and when an appeal should be permitted, and where—all these matters, in which the dearest interests of justice are bound up, and which since the success of the County Courts was established have pressed for careful and unprejudiced investigation, must come before this Commission, and it will no doubt receive full attention.

We consider, therefore, that all these Commissions are well timed and respectably selected, and it would be unjust if we did not express our conviction that the Lord Chancellor deserves credit, both in the issuing of the Commissions and with some qualifications in the selection of the Commissioners. In the choice that has been made we are happy to find that the Law Amendment Society, and more especially its Council, have been greatly resorted to; and if the arrows from that quiver are blunted by success, we know not where to look for others more serviceable. It appears to us, however, that if all these Commissions had been placed under some one regulating Head it would have been better. As it is, it is just possible we shall have conflicting recommendations. If we are asked what head? We have only one reply, a MINISTER OF JUSTICE.

SELECTION OF ADJUDGED POINTS

REPORTED SINCE 1ST AUGUST, 1853.

POINTS DETERMINED IN THE COURT OF CHANCERY.

COURTS.	REPORTERS.
Lord Chancellor, and Court of Appeal } in Chancery - - - }	2 De Gex, M. & Gord. Part 4.
Master of the Rolls (Lord Langdale)	13 Beav. Part 3.
V. C. Turner (now Lord Justice) -	10 Hare. Part 2.
V. C. Kindersley - - -	1 Drew. Part 4.

I. POINTS DETERMINED IN THE COURT OF CHANCERY.

1. Agreement—Construction of—Act of Parliament—Compulsory Powers under. 2. Annuity—Gift of, whether for Life or Perpetual—Will—Construction. 3. Annuity—Arrears—Interest—Stat. 3 & 4 Will. 4. c. 42. s. 28. 4. Confirmation by Will—Voidable Conveyance from Client to Solicitor—Pleading. 5. Costs—Breach of Trust—Trustees. 6. Covenant for perpetual Renewal of Lease—Form of renewed Lease. 7. Ecclesiastical Lease—Purchase Money and Compensation—Investment—Dividends. 8. Election—Will not passing Scotch Heritable Bonds. 9. Guardian and Ward—Principal and Surety—Undue Influence—Injunction. 10. Husband and Wife—Bequest to, and to Stranger—Will—Construction. 11. Husband and Wife—Wife's Equity to a Settlement, or Provision for Maintenance out of Life Interest—Particular Assignees for Value of Husband. 12. Mortmain—Statute of—Construction—Bequest of Shares in Joint Stock Bank. 13. Power—Devise in execution of—Stat. 1 Vict. c. 26. 14. Sale instead of Foreclosure—15 & 16 Vict. c. 86. s. 48. 15. Secret Trust—Void Devise—Charity—Trustee—Cestuique Trust. 16. Usury—Warrant of Attorney—Judgment—Security on Land. 17. Vendor and Purchaser—Copyholds—Whether Trustees for Sale of must be admitted. 18. Will—Construction—Illegitimate Children taking with legitimate Children,

1. **EX PARTE WALKER V. THE SHREWSBURY AND HEREFORD RAILWAY.** 1 Drew. 508.

Agreement—Construction of—Act of Parliament—Compulsory Powers under.

An agreement was entered into between a landowner and a Railway Company, having compulsory powers to take land, that if the Company should make their line, they should pay for such, if any, of the land as they should so take, at the rate of 500*l.* per acre; and in consideration of such agreement, the landowner agreed that he would permit the company to take such land, under the authority of their Act, on those terms. The landowner died; and then the Company took some of his land. It was held by Sir R. Kindersley, V. C., that the money belonged to his real, and not to his personal representatives. "This case," said his Honour, "turns on the construction of the contract, and is not within the authorities. . . . The contract arranges the price, and does nothing more. The terms of the contract show that to be its meaning. The Company had not made up their mind as to the precise line they would adopt. What is it that, under these circumstances, they contract for? Not that they will purchase any given quantity of land, but that, when they shall have determined on the construction of their line, and want the land, they will pay for such land as they shall take 500*l.* per acre. There is no agreement for the *purchase of land*; the agreement is merely, that if they take any land under the compulsory powers of their Act, the amount to be paid shall not be determined by a jury, but shall be 500*l.* per acre. For these reasons, without adverting to the authorities, it appears to me that the money paid in is not part of the personal estate, but was, at the death of the person who entered into the agreement, real estate, for the benefit of the persons entitled to his real estate."

2. **KERR V. THE MIDDLESEX HOSPITAL.** 2 De Gex, Mac. and Gord. 576.

Annuity—Gift of, whether for Life or Perpetual—Will—Construction.

A question often arises in the construction of a will where annuities are given, whether they are intended to be perpetual or for life only. The Lord Chancellor (Lord St. Leonards), in the above-mentioned case, thus lays down the law upon the subject:—"It is perfectly settled, that if an annuity be given *simpliciter*, that is, to one generally, a life interest only passes. It is equally,

I believe, undisputed, that if an annuity be directed to be provided *out of the proceeds of property, or out of property generally*, if an annuity is to be brought into existence by the application of property, and that annuity is given to a party generally, he will take the property appropriated to purchase the annuity, and therefore the annuity in perpetuity, if purchased. . . . Whatever sum therefore it would cost to produce the annuity must be invested for that purpose, or the annuitant may elect to take such principal sum." In the case of *Kerr v. The Middlesex Hospital* (heard by the full Court of Appeal), where these observations were made by Lord St. Leonards, it was held, overruling the decision of Sir J. Romilly, M.R., dissentiente Lord Justice Lord Cranworth, that certain annuities there in question were perpetual. There a testator, by his will, bequeathed as follows:—"I desire that my executors shall purchase annuities for each of my two sisters, E. B. and E. F., of 100*l.* a year each, the said annuities to be purchased in the British Funds." After giving other annuities *simpliciter* and legacies, the testator added, "I direct my landed property at O. to be sold by auction," and the produce to go to the carrying out of the aforesaid annuities and legacies; and should the produce of the said sale not be found sufficient for that purpose, I desire that the remainder shall be made up from my personal property." And he directed the remainder of his personal property, "after the above annuities and all legacies have been paid and effected," to be laid out "in the purchase of an annual income in the 3*l.* per cent. consols, for the benefit of the Middlesex Hospital." Lord Cranworth, dissenting from his colleagues, considered that the annuities were merely for life, and thought that the case was not governed by *Stokes v. Heron* (2 Dru. & War. 89. s. c. on appeal 12 C. & F. 161.) Lord Justice Knight Bruce, on the contrary, considered himself as bound by *Stokes v. Heron*, but particularly wished to guard himself from being understood as intimating how he should have been disposed to deal with the case if that of *Stokes v. Heron* had not existed. Lord St. Leonards, however, considered that in that case it was much more difficult to construe the gift as a perpetual annuity, and could not qualify the expression of his opinion, which he strongly entertained, notwithstanding that of Lord Justice Lord Cranworth and the doubt expressed by Lord Justice Knight Bruce.

3. IN THE MATTER OF POWELL'S TRUST. 10 Hare, 134.*Annuity — Arrears — Interest — Stat. 3 & 4 Will. 4. c. 42. s. 28.*

The question in this case was whether interest ought to be allowed upon the arrears of an annuity; and it was held in the negative by Sir George Turner, upon the authority of *Booth v. Leycester* (3 My. & Cr. 459.), and *Martyn v. Blake* (3 Dr. & War. 125.). It was attempted to support the claim for interest upon the provisions of the statute 3 & 4 Will. 4. c. 42. s. 28., but his Honour said that the statute did not appear to him to affect the question, for the Court of Chancery, before the passing of this statute exercised *some discretion* as to allowing or not allowing interest on arrears of annuities; and there was no reason why the statute, which merely gave powers to juries to allow interest if they should think fit, vesting some discretion in them, should be taken to have altered the rules by which the discretion of the Court was guided. His Honour considered that the cases of *Hyde v. Price* (8 Sim. 578.) and *Crosse v. Bedingfield* (12 Sim. 35.) depended upon special circumstances.

4. STUMP v. GABY. 2 De Gex, Mac. & Gord. 623.*Confirmation by Will — Voidable Conveyance from Client to Solicitor — Pleading.*

In this case an heir at law filed a bill, alleging that his ancestor, when in very embarrassed circumstances, had executed a voidable conveyance to his solicitor. The bill, after stating a pretence on the part of the defendants, who claimed under the solicitor, that the ancestor had confirmed the conveyance by his will, charged that he had died intestate as to the premises in question, and prayed that the conveyance, and any testamentary disposition by him in confirmation thereof, might be declared null and void. A plea was put in, that the ancestor, by his will, after reciting the probability of the conveyance being disputed, had ratified and confirmed it, was allowed by the Lord Chancellor (Lord St. Leonards). With reference to one argument urged on behalf of the plaintiff, that the ancestor had a mere right of entry, which at the date of the transaction in question was not devisable, his Lordship said he was clearly of opinion that it was not a right of entry, as the whole legal fee-simple passed by the conveyance, but a devisable interest. That a person in such circumstances executing a conveyance to his attorney, in the view of the Court remained the owner, subject to the repayment of the money which had been advanced by the

attorney; and the consequence was, that he might devise the estate, not as a legal estate, but as an equitable estate, wholly irrespective of all question as to any rights of entry or action, leaving the conveyance to have its full operation at law, but looking at the equitable right to have it set aside in the Court of Chancery. With regard to the second point argued on behalf of the plaintiff, viz., that the confirmation was of no avail, because it was not shown that the person confirming was made aware of all the circumstances under which the fraud existed, and of his right to have the former voidable instrument set aside, his Lordship made the following important observations: — “It is beyond dispute that a man may, if he pleases, confirm a voidable conveyance; and if a client, dealing with his solicitor, executes a voidable instrument, and afterwards chooses to confirm it by *will*, he clearly may. The difference between the confirmation of such an instrument by a *contract* between the same parties and a *testamentary* disposition is, that where a client deals with an attorney, and the latter commits what may be considered a fraud in this Court, and then induces the client to confirm that dealing, the attorney has to show that the confirmation was made by the client with a full knowledge of his rights to set aside the conveyance. I have nothing to do with such case, nor do I wish to disturb the decisions on that head; but here there was no such dealing; the party was disposing of his own property by will in favour of a person with whom he had previously been dealing; and it was equally competent for him to have disposed of the same property in favour of any other individual. It was a *testamentary act*, it was *not a matter of contract*, and the will, therefore, is the guide under which the Court must act; the testator has devised the estate in express terms; and my opinion is, that if he had not so devised it, but had simply said, referring to the prior conveyance, ‘I confirm it,’ that alone would have been a valid confirmation.”

5. BYRNE v. NORCOTT. 13 Beav. 336.

Costs — Breach of Trust — Trustees.

In this case where trustees stated by Lord Langdale, M. R., to have been “wholly guiltless of any bad design, and intending to do nothing but acts of kindness towards other parties,” had, in consequence of omitting to perform duties with which they had been charged, been made liable for a breach of trust, his Lordship made the following observations with respect to costs: — “I do not know of any instance where trustees are made to repair a

breach of trust, in which they have not been charged with the costs of the suit. It is almost always a necessary consequence, for they ought not to add to the loss of their *cestuisque* trust the costs of the suit rendered necessary for the purpose of obtaining redress."

6. THE COPPER MINING COMPANY v. BEACH. 18 Beav. 478.

Covenant for perpetual Renewal of Lease — Form of renewed Lease.

This case, though often referred to by conveyancers in argument, and decided by Sir John Leach, has not been hitherto reported. It appeared that a lessor granted a lease, and entered into a covenant, that he would always, at any time when requested by the lessees, demise the premises for the further term of thirty-one years, in which new lease were to be contained the same rents, covenants, articles, clauses, provisoes, and agreements. It was held that this amounted to a covenant for perpetual renewal, and that the proper form of lease to be granted by trustees was a demise for the new term reciting the original covenant by the testator.

7. EX PARTE THE BISHOP OF WINCHESTER. 10 Hare, 187.

Ecclesiastical Lease — Purchase Money and Compensation — Investment — Dividends.

The Bishop of Winchester, being the lessor of lands of the sea, demised them for lives and years. Part thereof was taken by a Railway Company; and the purchase-money and money for compensation on account of damage and severance was paid into Court. An application being made by the bishop, that the dividends on the sum invested might from time to time be paid to the bishop and his successors, until the further order of the Court, Sir George Turner, V.C., expressed his opinion to be that the bishop was not entitled to any portion of the sum invested, or the dividends to accrue upon the stock to be purchased therewith, until the lease or leases respectively, in which the several parcels of land taken by the company were comprised, should become renewable; and that, when the leases or either of them became renewable, the bishop might apply for the payment out of the fund of the deficiency of the fine occasioned by the diminution of the quantity and value of the land comprised in the renewed lease or leases.

8. MAXWELL V. MAXWELL. 2 De Gex, Mac. & Gord. 705.

Election — Will not passing Scotch Heritable Bonds.

A testator connected with Scotland, domiciled in England, having real and personal property in England, and heritable bonds affecting lands in Scotland, made a will according to the English law, and thereby, by virtue of every right, power, or authority, enabling him in that behalf, he gave, devised, and bequeathed to trustees, their heirs, executors, administrators and assigns, all his real and personal estate, whatsoever and *wheresoever*, upon trusts for the benefit of his wife and all his children equally. The word "dispone" not having been used in the devise, and there being no proper attestation clause according to the Scotch law, the will was, according to the Scotch law, inoperative for the purpose of passing the heritable bonds. It was held by the Lord Justices affirming the decision of Sir J. Romilly, M.R., that the eldest son was not put to his election between the benefits conferred upon him by the will, and the heritable bonds which descended to him as heir-at-law, upon the ground that it did not appear according to the rules of construction adopted by the English law that the testator intended to pass the Scotch Heritable Bonds. "The generality, the mere universality," observed Lord Justice Knight Bruce, "of a gift of property, is not sufficient to demonstrate or create a ground of inference, that the giver meant it to extend to property incapable, though his own, of being given by the particular act. If he has specifically mentioned property not capable of being so given, the case is not the same; as here, if the testator had mentioned Scotland in terms, or had not had any other real estate than real estate in Scotland, there might have been ground for putting the heir to his election."

9. ESPE V. LAKE. 10 Hare, 260.

Guardian and Ward — Principal and Surety — Undue Influence — Injunction.

In this case a promissory note appeared to have been signed by a young lady in her twenty-second year, as a surety for her step-father, in whose house she had been residing with her mother for many years previously. Sir George Turner, V.C., restrained execution against her as a judgment obtained by the payee. "I take it," said his Honour, "to be quite clear, that the principles of this Court go to this extent; that in the case of a security taken from a person just of age, living under the influence

and in the house of another person, with a relationship subsisting between such other person and the person from whom the security is taken, which constitutes anything in the nature of a trust, or anything approaching to the relation of guardian and ward, or of standing in *loco parentis* to the surety, this Court will not allow such security to be enforced against the person from whom it is taken, unless the Court shall be perfectly satisfied that the security was given freely and voluntarily, and without any influence having been exercised by the party in whose favour the security is made, or by the party who was the medium or instrument of obtaining it."

His Honour then made the following important observations on one of the singular, or rather startling propositions laid down by Lord Cottenham in *Wilde v. Gibson* (1 H. L. Cas. 605.):— "It is said that there are other circumstances alleged in the bill which rest the equity, not on the law of the case as applied to the circumstances to which I have referred, but on a case of personal fraud; and that no personal fraud being proved, this is brought within the principle laid down by Lord Cottenham in *Wilde v. Gibson*, and that the Court ought not to give any relief. Lord Cottenham, if I recollect rightly, qualified that principle in subsequent cases. It is not, as I take it, the law of this Court, that, because there are allegations of fraud superadded upon circumstances which of themselves would give the plaintiff an equity, that the equity arising from these circumstances is to be disregarded by the Court. With that qualification, I fully agree with the *dictum* in *Wilde and Gibson*."

10. IN THE MATTER OF WYLDE'S ESTATE; and of the 11th & 12th Vict. c. 96. 2 De Gex, Mac. & Gord. 724.

Husband and Wife — Bequest to, and to Stranger — Will — Construction.

By the law of England, a gift by will to a husband and wife is considered as a gift to one person. This rule has received a striking illustration in *Wylde's case*. There a sum of 700*l.* was bequeathed unto and amongst J. C. and C. his wife, and W. L., in equal shares and proportions; and in another part of the will, three legacies of 200*l.* each were given to J. C., C. his wife, and W. L. It was held by the Lords Justices that J. C. and C. his wife were only entitled to a moiety of the 700*l.*, and W. L. to the other moiety. "Whatever," observed Lord Justice Knight Bruce, "may be the state or the rule of the Civil Law on questions of this description,

I do not think the construction of a will even of personalty can be governed by it in this respect,—I mean the construction of a will of personalty where husband and wife are concerned,—the rights of husband and wife in respect of personalty standing by our law in a position so peculiar as they do. According to the rules and principles of our law, whenever a gift of personalty is made to husband and wife, the presumption is that it is given to one person, and that they take as one person; I say the presumption, because the nature and context of the instrument may be such as to render a different interpretation necessary; but it lies on those who assert that the husband and wife take as two rather than one, to demonstrate this from the nature and context of the instrument. In my opinion that is not done here. The context affords a plausible argument of more or less weight each way, not perhaps of much strength either way; but there is not, in my opinion, a balance against that which would be the ordinary construction.”

11. *TIDD v. LISTER. BASSIL v. LISTER.* 10 Hare, 140.

Husband and Wife—Wife's Equity to a Settlement, or Provision for Maintenance out of Life Interest—Particular Assignees for Value of Husband.

A very important question was raised in this case, viz. whether a married woman, whose husband does not maintain her, is entitled, as against a particular assignee for valuable consideration of the husband, to an allowance for her maintenance out of the income of real and personal estate, to which she was entitled for life; and Sir George Turner, V. C., after a very elaborate examination of the authorities and the principles upon which cases of this kind proceed, decided that she was not so entitled. His Honour observed, that the question seemed to have been first suggested by Sir W. Grant, M. R., in *Wright v. Morley*, 11 Ves. 12., but was not decided, but Sir John Leach, in *Elliott v. Cordell*, 5 Madd. 149., and afterwards Lord Brougham, in *Stanton v. Hall*, 2 Russ. & My. 175., decided against the view of the wife. It would require, therefore, some very clear principle, or some very decisive authority, to warrant him in arriving at a different conclusion. “Considering the question,” observed his Honour, “without reference to the authorities, it must, as I conceive, resolve itself into this point: ought a Court of Equity in these cases, against purchasers for value, to follow the law which gives to the husband the power of dealing with the income of his wife's property, or ought it to put in force its ordinary rule, that he who comes into

equity must do equity, the rule on which, as I believe, both the rights of married women to provisions for their maintenance and their rights to settlements are founded.

"In determining this point, the inconveniences which would ensue from the Court's acting upon the rule to which I have referred, must not, I think, be thrown out of view. Purchasers would become involved in inquiries into the relations between husband and wife, the extent of their other property, and their other means of maintenance; and the life interests of married women would become incapable of being dealt with, whatever might be the exigencies of the case. Looking to these consequences, and to the distinctions which I have pointed out, and not of course intending the observations which I have made to apply to a case of fraudulent alienation for the purpose of defeating the claims of the wife, I must confess myself unable to find any clear principle on which I can dissent from the decisions to which I have referred." His Honour considered the case as not affected by the recent decisions of *Vaughan v. Buck*, 1 Sim. N. S. 284., *Wilkinson v. Charlesworth*, 10 Beav. 324.

12. MYERS v. PERIGAL. 2 De Gex, Mac. & Gord. 599.

Mortmain, Statute of—Construction—Bequest of Shares in Joint Stock Bank.

In this case it was held by the Lord Chancellor (Lord St. Leonards), overruling the decision of Shadwell, V. C. (reported 16 Sim. 533.), in accordance with the certificate of the Judges of the Court of Common Pleas, that a bequest of shares in a Joint Stock Bank, the assets of which were by its deed to be deemed personal estate, and which consisted of freehold and copyhold estates, and money due upon mortgage of freehold, copyhold, and leasehold hereditaments, was not within the meaning of the statute of mortmain, 9 Geo. II. c. 36. "The question before me," said his Lordship, "is, whether the Legislature did or did not intend to strike at interests of this nature. If we look at the intention of the purchaser of these shares, it is obvious that he no more intended to buy an interest in any real estate which might form part of the partnership property, than to buy a portion of the real estate for his own use. By the very construction of the partnership deed such real estate would have gone to his personal representatives, and his real representative could not have taken any portion of the estate by descent. Undoubtedly, as was put in the argument, a state of circumstances might arise in which one

man might either be the survivor or the purchaser of the interests of his partners in the company, and thus become the possessor of the real estate; but assuming such a result, he would take it in a new light, he would find himself owner of real estate, and being the owner, he might of course elect to retain it as real estate. The respondents are under the necessity of admitting that real property purchased for the purpose of carrying on a trade would not fall within the statute. But why not? Take the case of a Dock Company: the dock itself is constructed upon real estate, that remains realty while the partnership remains, but it is not denied at the Bar that the buildings and offices of the Company would not be real estate, within the statute of mortmain; and the reason simply is, that the subject is of itself a necessary incident to the trade. Suppose this very company had bought real estate for the purpose of its trade, just as they might have bought a ship, it surely would have been competent for them to have done so.

"The true way to test it would be, to assume that there is real estate of the Company vested in the proper persons under the provisions of the partnership deed. Could any of the partners enter upon the lands, or claim any portion of the real estate for his private purposes? Or if there was a house upon the land, could any two or more of the members enter into the occupation of such a house? I apprehend they clearly could not, they would have no right to step upon the land; their whole interest in the property of the Company is with reference to the shares bought, which represent their proportions of the profits. No incumbrancer of an individual member of the Company would have any such right. In short, a member has no higher interest in the real estate of the Company than that of an ordinary partner seeking his share of the profits out of whatever property those profits might be found to have resulted. If he die at one particular time, he will leave the same interest in the partnership property, although that may consist of real estate at one period and not at another. The quality of the partnership property can neither alter its destination, nor the quantum of a member's interest. Upon all principle, therefore, I think it is perfectly clear that this bequest is not within the statute."

18. *LAKE v. CURRIE.* 2 De Gex, Mac. & Gord. 586.

Power—Devise in Execution of—Statute 1 Vict. c. 26.

Difficult questions often arise as to how far a general devise or

bequest operates as an execution of a power. In this case, however, which came before the full Court of Appeal, Lord St. Leonards has laid down the law upon the subject in such clear and explicit terms, as will for the future render these questions easier of solution. The facts were as follows: Lord Lake, having two estates, A. and B., on the 10th of August 1841, executed a settlement, by which he conveyed the former to himself for life, with remainder to his son in fee, with an ultimate reversion to himself in fee. Estate B. was then settled in trust, first for himself for life, then as he should appoint; and in default of appointment, to sell out and out, and to pay the money arising from the sale to his daughters equally, with an ultimate trust for himself in certain events specified. By his will made after the 1st Vict. c. 26., Lord Lake, referring to his settlement, confirmed it, and then, reciting that he had considerable freehold estates, and might become possessed of more, he devised all his real estates of which he might die possessed to certain persons as trustees, for purposes totally different from those of the settlement. Neither at the date of his will nor at his death had he any other estates besides A. and B. It was held by the Court of Appeal, reversing the decision of Sir John Romilly, M. R., that the testator must be taken to have known that he had a power of appointment over estate B., that the confirmation of the settlement operated only upon the estate A., and that consequently the devise was a good execution of the power. "I will state generally," observed Lord St. Leonards, "what I consider the law to be as applicable to cases of this kind, where, if there is an appointment at all, it is an appointment without express reference to the power. It is clearly settled that a general devise or bequest will not, independently of the late statute (1 Vict. c. 26.), operate as an execution of a power; but it is also settled, that where a testator disposes of real estate, not having any other than what is subject to the power, he is in such case to be taken as dealing with that estate, and that as to both realty and personalty, if the Court is satisfied by the manner in which the particular property is referred to, that the testator intended to deal with that property, the disposition will be a valid execution of the power. The cases have gone upon very fine distinctions, but the general rule is clear.

"It is said, however, that the late statute—which makes a general disposition operate as an execution of a power, and makes also the will take effect as from the death of the testator,—has altered the law in this respect. It is argued, that as before the statute a

general bequest of personalty could not operate as an execution of a power, because it would not be any expression of intention on the part of a testator who, although at the date of his will he might have no other property than that affected by the power, would yet know that the bequest would operate on whatever he might have at his death, so now, since real estate held by the testator at his death will pass by his will, the same rule must apply generally, and a disposition of realty will not operate as an execution of a power, even where the testator has no other at the date of his will, because he may at his death have property which will be affected by the devise. The statute, however, so far from operating in this way, gives greater extent to the intention of testators, and provides as to general powers of appointment that they shall be deemed well executed by a devise, unless a contrary intention appears by the will. The intention was to extend, and not to narrow, the operation of devises, and therefore to hold, that cases which before the Statute would have been an execution are not so now, would be contrary to the whole scope of the Act; and if the new law is to operate at all, it must be in favour of the appointment. It is now absolutely necessary to show a contrary intention to exclude the execution of the power, while under the old law it was needful to show the intention to exercise the power; the case is therefore stronger in favour of the appointees under the new than under the old law."

14. *WAYN v. LEWIS.* 1 Drew. 487.

Sale instead of Foreclosure—15 & 16 Vict. c. 86. s. 48.

It has been held by Sir R. T. Kindersley, V. C., that the Court has no power to order a sale under the 48th section of the Chancery Improvement Act (15 & 16 Vict. c. 86.), on *interlocutory* application, but only where before the Act foreclosure might have been decreed.

15. *RUSSELL v. JACKSON.* 10 Hare, 204.

Secret Trust—Void Devise—Charity—Trustee and Cestuique Trust.

A testator devised and bequeathed his residuary estate to two persons, and intimated to *one of them* orally that he had confidence in them, and was satisfied that they would carry out his intentions, which they well knew; and this intimation of the testator was thereupon assented to by such one of the devisees. It

was held by Sir George Turner, V. C., that the undertaking by the devisee that he would carry out the intention constituted a gift upon a secret trust, which prevented the other devisees taking beneficially, and as it appeared that the trust was for the foundation of a socialist school, and, either charitable or illegal, it was declared void as to the real estate, mortgages and chattels real, and an inquiry was directed into the nature of the trust contemplated. The Vice-Chancellor observed, that upon the assumption that one of the devisees was not present, it was clear that the gift would not have been made to him but for the promise given by the other that the intentions should be carried into effect. "I fully agree," added his Honour, "to the principles laid down in *Huguenin v. Baseley* (14 Ves. 289.), followed in many other cases, that no person can claim an interest under a fraud committed by another. However innocent the party may be, if the original transaction is tainted with fraud, that taint runs through the derivative interest, and prevents any party from claiming under it."

16. *LANE v. HORLOCK.* 1 Drew. 587.

Usury — Warrant of Attorney — Judgment — Security on Land.

In this case money had been lent upon bills of exchange at a rate of interest above 5*l.* per cent. The lender having previously made minute inquiries as to the amount and value of the borrower's real estate, took a warrant of attorney to confess judgment, expressly stipulating that he should be at liberty to enter up judgment immediately, and he did enter up judgment within twenty-four hours. It was held by Sir R. T. Kindersley, V. C., that this was a security on land within the proviso in 2 & 3 Vict. c. 37., and that the judgment, though valid as against personalty, could not be enforced against the proceeds of the sale of the land. It appeared that the case had come before one of the judges of the Court of Queen's Bench, in an attempt made to set aside the judgment in 1846 (*Lane v. Horlock*, 16 Law Journ. Q. B. 87. 4 Dowl. & Lownd. Pr. Ca. 408.), and the learned Judge refused to set it aside. The grounds upon which the learned Judge based his decision were, *first*, that though the judgment which might be entered up by virtue of the warrant of attorney would be a charge on the lands, the warrant of attorney itself contained no reference whatever to the lands, but merely authorised judgment to be entered up immediately; and *secondly*, that if an action had been brought upon the Bills after they fell due, and the plaintiff had forborne

upon receiving a *cognovit* authorising immediate judgment, with stay of execution, it could not be contended that that case would be within the proviso, and the forbearance upon the security of lands. His honour, differing from the reasons given for the decision in *Lane v. Horlock* at Common Law, nevertheless thought it rightly decided, upon the ground that the judgment, although invalid as against the lands of the debtor, was valid as against his person or goods, and could not, therefore, be rightly set aside. The very important observations of his Honour upon this topic are as follows:—“The more I have considered the matter the more strong is the conviction to my mind, that this is the true and just and reasonable construction of the Act; and, taking into consideration the steps by which the Legislature gradually relaxed the prohibitions of the usury laws, first by 3 & 4 Will. 4., exempting only bills or notes having not more than three months to run, then by 1 Vict., extending the exemption to bills or notes not having more than twelve months to run, and at length by 2 & 3 Vict., exempting all contracts whatever, with the special exception to the security of land, it does appear to me that to hold the whole contract void because one of the securities contracted for is the security of land, is to give a construction to the Act altogether beyond the intent and purpose of the Legislature. It is satisfactory to me to have found a case, decided by a Court of the highest authority, which justifies this view of the construction of the Act. It is the case of *Ex parte Warrington re Leake* (17 Jur. 430.), which came before the Lords Justices sitting in Bankruptcy. The facts were that Leake gave to Warrington promissory notes to secure sums of money advanced to him by Warrington, with 6 per cent. interest; and at the same time that each note was given an agreement was made that Leake should secure the money advanced by a mortgage or charge on certain real estates of which Leake was lessee, and such mortgages were executed according to the agreement; Leake became bankrupt, and Warrington's claim to prove the amount of the notes having been rejected by the Commissioner, on the ground of usury, he appealed to the Lords Justices, and their Lordships reversed the decision of the Commissioner, and admitted the proof on the notes. In giving judgment, Lord J. Turner, after reading the clause in the Act, with the proviso, thus expressed himself (p. 432.):—“The enactment, therefore, clearly validates the notes. In my opinion, therefore, these bills are valid, and must be admitted to proof.” Lord J. K. Bruce expressed his concurrence. Here,

then, is a clear judicial assertion of the principle that the proviso in the Act was not intended to invalidate the whole transaction, but to invalidate it so far, and only so far, as relates to the security on land. To this principle I mean to adhere in deciding the present case, being satisfied that such is the sound and rational construction of the Act, and the only construction which really effectuates the intention of the Legislature. Adopting, then, this construction, it appears to me to follow, that in every case in which money is lent at more than 5*l.* per cent. interest upon bills and other securities not being the security of land, and also on the security of land, a Court, whether of Law or Equity, is bound to uphold the transaction as to every part of it, except only as to security on land, and that it is equally bound to refuse its assistance to the creditor to enable him to enforce the security on land; and that, supposing, for example, a loan to be made at more than 5*l.* per cent. interest, and the parties to agree that it shall be secured by a bill or note, not having more than twelve months to run, and by a deposit of goods, and also by a mortgage so charged on land, the transaction ought to be supported so far as relates to the bill or note. And the security on the goods, because so far it is expressly authorised by the Act; and the transaction ought to be held void so far and only so far as relates to the security on land, because that is expressly prohibited by the Act. Now the nature and effect of a judgment is such, that it is capable of being enforced either against the person or the goods or the lands of the party against whom it is entered up. If, then, a judgment is one of the securities agreed upon between the lender and borrower on the occasion of a loan of money at more than 5*l.* per cent. interest, it is perfectly consistent with the Act of Parliament that the judgment-creditor should enforce it by execution against the person of the debtor, or against his goods; but it is, in my opinion, inconsistent with the Act that he should enforce it against the lands of the debtor. The judgment itself is valid, because the creditor may use it in a manner and for a purpose authorised by the Act; but the creditor ought not to be assisted in using it as a charge upon the debtor's land, for that is what the Legislature intended to prevent."

17. GLASS V. RICHARDSON. 2 De Gex, Mac. & Gord. 658.

Vendor and Purchaser—Copyholds—Whether Trustees for Sale of must be admitted.

An important question on the law relating to copyholds arose in

this case, on appeal from the decision of Turner, V. C. (reported 9 Hare, 698.), viz. whether the devisees in trust for sale of copyholds can make a title to a purchaser without first causing themselves to be admitted and then surrendering to him. The facts were briefly as follows:—A testator devised copyholds to such uses as A. and B., or the survivor of them, his executors or administrators, should by deed appoint, and subject thereto to the use of A. and B., their heirs and assigns for ever, upon certain trusts, and he directed his said trustees to sell the copyholds as soon as conveniently might be. It was held by the Court of Appeal, though with some doubt on the part of Lord Justice Knight Bruce, affirming the decision of the Court below, that the trustees could make a good title to a purchaser without being admitted. “A testator,” observed the Lord Justice Lord Cranworth, “disposing of a copyhold by his will, does no more than name the person whom the lord shall admit, and whether he fixes on a person by name, or authorises another to name him, who accordingly does name him, the result must be the same. The point was in fact so decided in *Holder v. Preston* (2 Wils. 400.). It is true that in that case there was no gift to the trustees for sale, in default of and until appointment by them; but this, in my opinion, makes no difference so far as relates to the present question. There the bargain and sale when made defeated the title of the heir; here it will defeat the title of the devisees; but the governing principle is the same in both cases, namely, that the bargainee has a title directly from the testator, is substantially his nominee or devisee, and so is entitled to call on the lord to admit him. It was contended that this was a hardship on the lord. But certainly that is not so. All that the lord can insist on is, that he shall never be without either a tenant or the possession of the land, and this is effectually secured to him by his right of seizing the land *quousque*, upon the death of the tenant, unless the heir, or some one claiming under the testator’s will, comes in and is admitted. The point for decision is not what surrender the lord was bound to accept, but whether he is not bound to admit the bargainee of the trustees, as being in truth the nominee of the devisor. I concur with the Vice Chancellor in thinking that he was, and that the case being one admitting of no reasonable doubt, the order compelling the defendant to complete his purchase was perfectly right, and so that the present appeal ought to be dismissed.”

18. OWEN v. BRYANT. 2 De Gex, Mac. & Gord. 697.

Will—Construction—Illegitimate taking with legitimate Children.

Although *primâ facie* a gift by will to "children," means legitimate children, there is no invariable rule that illegitimate children cannot, under any circumstances, participate with legitimate children in the benefit of a gift or bequest to children generally, as in such case the question is one which depends upon the language of the will; and if from the whole context of the will it appears that illegitimate children are to be included with legitimate children in the benefit intended, illegitimate children may take. Upon these grounds in *Owen v. Bryant*, where the testator by his will, after reciting that his two daughters by his first wife were amply provided for, and that he had nine children, whom he named, being three sons and six daughters, and that on the marriage of four of the six daughters he had advanced certain sums, and that it was his intention to make similar provision for his two unmarried daughters, gave his real and household property, upon trust, after his wife's death, to sell and divide the proceeds among all and every his children by his then wife, and directed that the trustees should, during the life of each of his *said children* who should be a daughter, pay the income of her share to her for her separate use, without power of anticipation. One of the nine children was illegitimate. It was held by the Lords Justices that she took equally with the others.

POINTS DETERMINED IN THE COURTS OF COMMON LAW.

COURTS,	REPORTERS,
Queen's Bench	14 Q. B. Parts 1, 2, 3. 16 Q. B. Part 3. 1 Ellis & B. Parts 1, 2.
Common Pleas	9 Common Bench, Part 3. 10 Common Bench, Part 5. 11 Common Bench, Parts 1, 2, 3, 4.
Exchequer	7 Exchequer, Parts 4, 5. 8 Exchequer, Parts 1, 2, 3, 4.
22 Law Journal, N. S. Common Law.	

1. Act of Bankruptcy—Assignment of entire Stock. 2. Arbitration—Ousting Jurisdiction of Superior Courts. 3. Attorney—Confidential Communi-

cation — Duration of Retainer — Costs — Heading and Delivery of Bill — Liability for Clerk's Acts — Admission of in Court of Great Sessions. 4. Bankers — Liability of — Forged Indorsements — Crossed Cheques. 5. Carrier — Liability under written Conditions — Rate of Charges — Passengers' Luggage — Felony by Servant — Countermand of Direction by Consignor. 6. Corporation — Use and Occupation by — Liability under Parol Contract. 7. County Bridge — Action for Damages for not repairing. 8. County Court Limits of Jurisdiction — Liability of Officer. 9. Devise — What Words pass a Fee-simple. 10. Parliament — Abjuration Oath — Disqualification of Jews. 11. Policy of Indemnity — What amounts to a Warranty in. 12. Practice — Foreigner — Security for Costs — Evidence of Party advocating his own Case. 13. Public Company — Mandamus — Obligation of compulsory Powers. 14. Restraint of Trade — What an unreasonable Covenant. 15. Shipping — Bill of Lading — Authority of Master — Liability of Owner — Damage by Rats. 16. Stamp — Agreement — Evidence from, when unstamped. 17. Statute — Discretionary and imperative Powers under.

1. **YOUNG, AND OTHERS, ASSIGNEES OF NORMANTON, A BANKRUPT, v. WARD.** 8 Ex. 221.

Act of Bankruptcy — Assignment by way of Mortgage of entire Stock, &c.

In this case the defendant had been in the habit of discounting certain bills of Messrs. Brooks and Co. for the bankrupt, who was a manufacturer at Bradford, and in June, 1851, applied to him for security for the due payment of these bills, and on the 2nd July a deed of assignment was executed by the bankrupt, by which the bankrupt assigned the frames, looms, machinery, and effects at his manufactory to the defendant to secure the due payment of such bills not exceeding 2000*l*. At the date of the deed the defendant only held the bankrupt's bills to the extent of 400*l*, and the bankrupt had other property not included in the assignment, but on the 2nd December, the bankrupt's bills in the defendant's hands amounted to nearly 800*l*, and the defendant took possession under the deed. The proceedings in bankruptcy were taken shortly afterwards.

Held by the Court of Exchequer in an action brought by the assignees to recover the machinery, &c., that there was no evidence to constitute the execution of the assignment an act of bankruptcy, and further, that, if there had been any such evidence, the proper question for the jury was, not whether the deed, if acted upon, would have stopped the business; but, whether it would have produced insolvency.

2. SCOTT v. AVERY. 8 Exch. 487.—AVERY v. SCOTT, 8 Exch. 497.

Arbitration—Agreement to oust Jurisdiction of Superior Courts.

This was an action upon three policies of insurance effected between the plaintiff and the defendant and the other members of the Newcastle General A. 1. Insurance Association, of which the plaintiff and defendant were both members. The policy was in the usual form, and the plaintiff's loss was proved, and the only question arose on the rules of the association which provided, *inter alia*, in substance that the sum to be paid by the association to any suffering member for loss or damage, should in the first instance be ascertained and settled by the committee, and in case of any difference arising, that certain arbitrators should be selected to settle the same, which settlement should be a condition precedent to the right of any member to maintain any such action or suit.

Held by the Court of Exchequer that the rule relied upon was void, as an attempt to oust the Superior Courts of their jurisdiction.

Held in the Exchequer Chamber that the above contract was not one ousting the Superior Courts of their jurisdiction, as it did not deprive the plaintiff of his right to sue, but only rendered it a condition precedent that the amount to be recovered should be first ascertained either by the committee or by arbitrators.

3. CLEAVE v. JONES. 7 Exch. 421.—DWYER v. COLLINS. 7 Exch. 639.—WHITEHEAD v. LORD, ADMINISTRATOR, &c. 7 Exch. 691.—DAUBENY v. PHIPPS. 16 Q. B. 504. 514.—GRIDLEY v. AUSTIN. 16 Q. B. 504.—COOK v. GILLARD. 1 E. & B. 26.—DUNKLEY v. FARRIS. 11 C. B. 457.—IN RE HUMPHREYS. 14 Q. B. 388.

Attorney—Confidential Communication—Duration of Retainer—Costs—Heading and Delivery of Bill—Liability for Clerk's Acts—Admission of in Court of Great Sessions.

The plaintiff in the first of these cases was employed by the defendant as her attorney in winding up the affairs of her late husband, of whom she was executrix. In the course of that business the plaintiff requested defendant to let him have a statement of the debts of her late husband, and what had been paid in, in order to prepare a case for counsel. The defendant in consequence sent to him an account book which contained an item of

interest paid on a promissory note given by her to the plaintiff for money advanced, and it was *held*, that the account book was a privileged communication, and, therefore, the plaintiff could not in an action on the note give in evidence the item of interest paid, in order to defeat the statute of limitations.

Dwyer v. Collins was an action by the indorsee against the acceptor of a bill of exchange, and the defence was that the bill was given for a gaming debt. The defendant proved the gaming, and that he gave a bill for the amount, the only one he ever gave to the drawer of the bill now declared on. To prove the identity of this bill, the plaintiff's attorney was called, who admitted possession of the bill, but refused to produce it, relying on his privilege, and it was *held*, in accordance with *Coates v. Birch*, 2 Q.B. 252., that he was bound to produce the bill.

In *Whitehead v. Lord*, the plaintiff was retained, in 1835, as the solicitor of the defendant's testatrix, to defend a Chancery suit; and the present action was brought for the plaintiff's bill of costs therein; and the defendant now pleaded the Statute of Limitations. It appeared that an order was made in 1840, that certain persons should be made additional parties to the suit by supplemental bill. This was not done, nor was any other proceedings taken in the suit. The defendant's testatrix died in 1851, and the plaintiff then gave notice to the defendant that unless 30*l.* was paid him he would cease to act further in the suit. The plaintiff now claimed 68*l.* for costs, up to Michaelmas 1840: and a verdict having been given for that sum, the Court of Exchequer held that the Statute of Limitations was no bar.

"The rule," said Mr. Baron Parke, "was correctly laid down in *Harris v. Osbourn* (2 Cr. & M. 629.), that an attorney, under a retainer to conduct a suit, undertakes to conduct the suit to its termination, and he cannot sue for his bill until that time has arrived, subject, however, to the exception then stated, and subject also to the additional exception which arises upon the death of the client, in which case he can sue the personal representatives." Mr. Baron Martin added, "The plaintiff's right to sue did not date from the time of the retainer, and no definite period can be pointed out when he could have sued before the death of the client."

Daubeny v. Phipps was an action on an attorney's bill, against one of the managing committee of "the Northampton, Lincoln, and Hull Railway Company," provisionally registered. It appeared that the bill was headed "Northampton, Lincoln, and Hull

Railway, to R. H. D. (the attorney), debtor." The bill consisted of items for work relative to the formation of the railway, but did not further point out the party charged. It was delivered to the attorney of the company, and was afterwards perused and commented on by the defendant, one of the provisional committee.

On pleadings which put in issue the delivery of a bill according to stat. 6 & 7 Vict. c. 78. s. 37., it was held by the Court of Exchequer Chamber that the bill was sufficiently headed to point out defendant as a party charged, and that there was evidence for the jury of a delivery to the defendant himself.

The same issue being raised in *Gridley v. Austin*, it appeared that the costs were for business done in the arrangement of a separation between Mrs. H. (defendant's niece) and her husband, while Mrs. H. was on a visit to defendant. After Mrs. H. had left defendant's house, the bill was delivered there, headed "In the matter of Mr. and Mrs. H.," enclosed in a letter addressed to defendant, and saying, "As I understand Mrs. H. is no longer residing under your care, and presuming, therefore, that you may not be remaining longer in town, I beg to hand you my account, in the hope that it will be found satisfactory." The Court of Queen's Bench held that it did not sufficiently appear that the bill was delivered to defendant as the "party to be charged" within the statute.

In *Cook v. Gillard*, the bill of costs delivered contained some items for proceedings, such as could only take place in one of the Superior Courts, but contained nothing to show in which of the Superior Courts the business took place; and it was held by the Court of Queen's Bench, on the authority of *Martindale v. Falkner* (2 Common Bench Reports, 206.); *Anderson v. Boynton* (13 Q. B. 308.); *Keene v. Ward* (18 Q. B. 515.); and *Cozens v. Graham* (21 Law Journ. C. P. 206.); that the bill was sufficient, the statute not requiring in terms the name of the Court to be given, and sufficient information being afforded by the bill to enable the party charged to tax the same.

In *Dunkley v. Farris*, the plaintiff's attorney's clerk had forged the Court's seal upon a writ of summons. The Court of Common Pleas set aside the writ and subsequent proceedings, and ordered the attorney personally to pay the costs.

"*Re Humphreys*" was the case against an attorney of the Court of Great Sessions of Wales, whose name, under section 16. of the Welsh Judicature Act (11 Geo. 4. c. 70.) had been placed on the shilling role of the Courts at Westminster. The attorney had,

however, conducted the proceedings in an action in the Queen's Bench, where the defendant did not reside in Wales or Cheshire at the commencement of the suit; and the Court of Queen's Bench granted an attachment against him, under the statute 6 & 7 Vict. c. 73. s. 85.; and it was afterwards *held*, in the same Court, that the attorney could not be admitted to practise generally in the Courts at Westminster without payment of the difference of duty directed by s. 17. of the first-mentioned Act. (See *Re Humphreys*, 7 Dow. & L. 344.)

4. *ROBARTS v. TUCKER, SECRETARY OF THE PELICAN LIFE INSURANCE COMPANY, IN ERROR.* 16 Q. B. 560. — *BELLAMY AND ANOTHER v. MARJORIBANKS AND OTHERS.* 7 Exchequer, 389.

Bankers — Liability of — Forged Indorsements — Crossed Cheques.

The Pelican Office were in the practice of paying certain losses by accepting drafts in London, drawn by their agent, to the customer's order; the drafts were not drawn till the Company in London gave the agent leave to draw, nor accepted till they bore the indorsement of the payees, and were found, on examination, to correspond with the leave to draw. When accepted, they were made payable at Messrs. Robarts', who were not informed of this practice: a loss of 5000*l.* became due to the executors of a Mr. Isherwood at Manchester. The Company's agent there, in pursuance of leave, drew on the Company a draft for 5000*l.*, payable to the executors' order, and delivered it to their solicitor. This draft, purporting to be indorsed by the executors to the order of Messrs. Jones Lloyd, was, by Messrs. Jones Lloyd, presented for payment to the Company, and accepted, payable at Robarts'. On maturity, it was there paid to Messrs. Jones Lloyd. This payment was duly debited in the pass-book to the Company, who credited Robarts with the same. No objection was made till, six months afterwards, it was discovered that the indorsement, purporting to be that of the executors of Isherwood, was a forgery by the solicitor; and the company were compelled to pay the executors. Held by the Exchequer Chamber that Robarts were liable to pay the amount to the office, a banker not being at liberty, without the express direction of the customer, to debit his customer with payments made to any one who claims through a forged indorsement, and so cannot give a valid discharge.

Bellamy v. Marjoribanks was an action brought against the defendants (Messrs. Coutts and Co.), for negligence in payment of

the plaintiff's cheque for 2596*l.* 17*s.* The plaintiffs, who were trustees of a Mr. Frank, had deposited in defendants' bank certain trust monies, as to which there was a Chancery suit pending; and in June, 1845, it became necessary to pay over these monies to the account of the Accountant-General at the Bank of England. On this pretext, a Mr. Geary, who was solicitor for some of the parties in that suit, drew out the cheque in question in his own favour. The plaintiffs signed it, adding at the end, "General unpaid costs account," and crossing it with the words, "Bank of England, for account of the Accountant-General." On the cheque being returned to Geary in this state, he struck his pen through the words "Bank of England," &c.; and having written underneath the names of his own bankers, "Gosling and Co.," paid the same into his own account with that firm, to whom the amount was paid by the defendants, and received by Geary.

The custom proved was that the crossing a cheque with a banker's name operated as an instruction to the drawee to pay it only to some bankers, not to any particular banker; and there was evidence that the Bank of England were precluded, by their own practice, from receiving the amount of the cheque from the defendants. *Held* by the Court of Exchequer that the custom proved was valid, and had not the effect of restricting the negociability of the cheque, and that the defendants were not liable for paying the cheque under the circumstances already stated.

5. *CARR V. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.* 7 Ex. 707.—*AUSTIN V. MANCHESTER AND LINCOLNSHIRE RAILWAY COMPANY.* 10 C. B. 454.—*MARSHALL V. YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.* 11 C. B. 655.—*BUTT V. GREAT WESTERN RAILWAY COMPANY.* 11 C. B. 140.—*SCOTHORN V. SOUTH STAFFORDSHIRE RAILWAY COMPANY.* 8 Ex. 341.

Carrier—Liability under written Conditions—Rate of Charges—Passengers' Luggage—Felony by Servant—Countermand of Direction by Consignor.

Carr v. Lancashire and Yorkshire Railway Company, was an action for damage done to the plaintiff's horse, whilst being carried on the defendant's railway, from Wakefield to Knottingley. The horse was delivered to the defendants at Wakefield, and the defendants gave the plaintiff a ticket with these words at the bottom: "This ticket is issued subject to the owner's taking all risks of conveyance whatsoever, as the Company will not be responsible for any injury or damage (howsoever caused) occurring to live stock

of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles."

Held by the Court of Exchequer, in arrest of judgment, that the defendants had engaged to carry the plaintiff's horse under a special contract, the terms of which were contained in the notice, and that by that notice the plaintiff had agreed, that the defendants should not be responsible for such a loss, although occasioned through their negligence.¹

In *Austin v. Manchester and Lincolnshire Railway Company*, horses were delivered to the defendants to be carried by them from New Holland, Lincolnshire, to Shoreditch, for hire, subject to a note or ticket containing the following notice: "This ticket is issued, subject to the owner's undertaking to bear all the risk of injury by conveyance and other contingencies, and the owner is required to see to the efficiency of the carriage before he allows his horses or live stock to be placed therein; the charge being for the use of the railway carriages and locomotive power only; the Company will not be responsible for any alleged defects in their carriages or trucks; unless complaint be made at the time of booking, or before the same leave the station. Nor for any damages, however caused, to horses, cattle, or live stock of any description, travelling upon their railway or in their vehicles."

Held, that giving to the words of the contract their most limited meaning, they must apply to all risks of whatever kind, and however arising, to be encountered in the course of the journey; and, therefore, that the Company were not responsible for injury done to a horse from the firing of a wheel in consequence of the neglect of the servants of the Company to grease it.

Marshall v. York, Newcastle, and Berwick Railway Company, was an action brought against the defendants for loss of luggage; and it was *held*, that plaintiff could recover, though the fare was paid by his master, the action being founded on a breach of duty and not on contract.

The payment by the master was payment by plaintiff. (See *Pippin v. Sheppard*, 11 Price, 400.)

Scothorn v. South Staffordshire Railway Company, was an action for non-delivery of the plaintiff's goods, entrusted to the defendants as carriers. The plaintiffs sent the goods in question to the Great Bridge station of the defendants, to be forwarded to

¹ Whilst this case was pending, the same decision was come to by the Court of Common Pleas in *Austin v. Manchester and Lincolnshire Railway Company*, 16 Jur. 763., and by the Court of Queen's Bench in *Great Northern Railway Company v. Morville*, 21 L. J. Q. B. 319.

Scothorn and Co., East India Docks, passenger ship "Melbourne," and paid the carriage. Whilst the goods were in transitu, one of the plaintiffs left with the agent of the Company, at Euston Square station, the receipt for the goods, with the words written across it, "Send the boxes, &c., Scotthorn and Co., Engineers, Bell Wharf, Ratcliffe," and the agent said that the goods should be duly delivered, according to this address, without additional charge; they were, however, sent to the "Melbourne," carried to Australia, and lost.

Held, by the Court of Exchequer, that the plaintiff was entitled to recover, the defendants being bound to deliver the goods according to the directions of the plaintiff, who had a right to countermand his original directions.

6. FINLAY V. BRISTOL AND EXETER RAILWAY COMPANY. 7 Ex. 409.

Corporation—Use and Occupation by—Liability under Parol Contract.

This was an action of Assumpsit for use and occupation, in which it was proved that the defendants, an incorporated company, occupied plaintiff's premises for the purposes of their business, from December 1846 to December 1848, on a parol promise to pay 100*l.* per year, and then left without giving notice. The defendants paid rent subsequently to March 1849, and the plaintiff now claimed the balance of that year's rent.

Held, that the defendants were not liable, there having been neither actual use and occupation by them after March 1849, nor a contract under seal.

7. MCKINNON V. PENSON. 8 Ex. 319.

County Bridge—Action for Damages for not repairing.

This was an action in the case brought by the plaintiff to recover damages, sustained by reason of the ruinous condition of a certain common public bridge in the county of Cardigan. It was proved that the defendant was surveyor of county bridges for the said county, that the bridge in question was very much out of repair, and had been so for a long time, and that the defendant's servants in driving over the bridge in a carriage, was precipitated into the water, whereby he was much injured, and the plaintiff lost his services and the goods in the carriage.

Held, by the Court of Exchequer in arrest of judgment, on the authority of *Russell v. the Men of Devon*, 2 T. R. 667., and on the construction of 43 Geo. III. c. 59., that the action was not maintainable.

8. DAVIS v. WALTON. 8 Exch. 153.—CHEW v. HOLROYD AND ANOTHER. 8 Exch. 249.—REGINA v. EVERETT. 1 E. & B. 273.—THOMPSON v. INGHAM. 14 Q. B. 710.—ABLEY v. DALE. 11 C. B. 378.—DEWS v. RILEY. 11 C. B. 484.

County Court—Limits of Jurisdiction—Liability of Officer.

Davis v. Walton was an action brought in the Court of Exchequer, for obstructing the plaintiff's wharf, on the river Thames, by mooring ships and vessels there for an unreasonable time. The defendants pleaded the custom of the river Thames¹ for vessels coming to wharfs to be unloaded to overlap the adjoining wharfs, and a verdict was returned for 40s., and on a rule to deprive the plaintiff of costs, it was *held*, that the title to a corporeal hereditament did not come in question, and that the County Court had jurisdiction to try the custom.

Chew v. Holroyd and another was a plaint in the County Court for a trespass committed by breaking the doors of certain rooms in a cottage of the plaintiff. On the trial, the plaintiff's case was, that he had let the defendant a portion only of the cottage, and had reserved to himself the rooms in which the trespass was committed. The defendant's case was, that the plaintiff had let him the whole of the cottage.

Held, on an application for a prohibition, that title to a corporeal hereditament was in dispute under the 58th section of the 9 & 10 Vict. c. 95., and that the County Court had no jurisdiction over the plaint.

Regina v. Everett was a rule for a prohibition to restrain the trial in a County Court of an action to recover back the last of two sets of rates claimed by the Trinity House on a vessel passing Ramsgate harbour, under 32 Geo. III. c. 74., the question being, whether the voyage out and home constituted separate voyages within the meaning of the Act. The Court of Exchequer held, that the title to "toll" was in question in the plaint, and that the County Court was deprived of jurisdiction by the 9 & 10 Vict. c. 95. s. 58.

In Thompson v. Ingham the question arose on the pleadings in prohibition. The plaintiff declared, that one Batty had sued him in the defendant's County Court, in respect of a certain field, and that he, Thompson, then insisted that the title was in question; but the defendant proceeded to hear and determine the plaint.

¹ See as to this custom, Pulling's "Customs of London," p. 368.

The plea stated, that on Thompson's insisting that the title was in question, Batty denied it, and that the Judge, after hearing the evidence and arguments on both sides, decided that the title was not in question, and proceeded to hear and decide the case; and that on the hearing, neither party adduced any evidence or argument other than those adduced before. On general demurrer it was held by the Court of Queen's Bench, that the plea was bad, for that it either admitted that the title was, in fact, in question, in which case the opinion of the Judge, that it was not so, would not give him jurisdiction under 9 & 10 Vict. c. 95. s. 58., or it set up the decision of the Judge on that question as conclusive, which it is not, but is open to review by prohibition.

In *Abley v. Dale*, it was decided by the Court of Common Pleas, that a discharged insolvent debtor is still liable to be committed under s. 99. of 9 & 10 Vict. c. 95. for disobeying an order made upon a judgment summons under s. 98. obtained after his discharge. Lord Chief Justice Jervis observed, in giving judgment, that the discharge of an insolvent debtor does not, in any view of the case, of necessity satisfy the judgment or order, and take away the jurisdiction of the County Court. To commit such a debtor for non-payment of a particular creditor, is, except under very special circumstances, manifestly unjust, but cases may occur, though rarely, in which the exercise of such a power would be justifiable.

The same Court decided in *Dews v. Riley*, that a County Court clerk is not liable in trespass for imprisonment by him *virtute officii*, though the Judge's order be bad.

In such a case the defence is admissible, under "not guilty by statute," by virtue of 13 & 14 Vict. c. 61. s. 19.

9. BURTON V. WHITE. 7 Ex. 720.

Devise—What Words pass a Fee-simple.

This was a special case from the Court of Chancery for the opinion of the Court of Exchequer on the construction of the following devise contained in the will of Aaron White, dated 17th July, 1820. "I give and bequeath to my son, John White, *all that Farm or Estate* I bought of Mr. Bradley, of London, containing about twenty acres, situate at the Quinton, in the parish of Hales Owen, in the county of Salop, and in the occupation of myself, my son George White, William Read, Benjamin Yates, and William Jones." *Held*, in conformity with *Gardner v. Harding*, 3 Moore, 565., *Doe D. Pottow v. Fricker*, 6 Ex. 510., that the words passed a fee-simple to John White.

"It is very desirable," said Parke B., "that effect, if possible, should be given to every word that a testator has used; now the word estate is sufficient to pass the whole interest a testator has in the subject matter, unless it be controlled by other words in the will, so as to require it to be considered as merely descriptive of the *corpus* of the property disposed of by the will. In *Gardner v. Harding*, the words of the will were held to pass an estate in fee simple, and that case is hardly distinguishable from this, only that here the word 'farm' is introduced in conjunction with the word 'estate.'"

10. *MILLER V. SALOMONS.* 7 Exch. 475., 22 L. J. Ex. 169.

Parliament—Abjuration Oath—Disqualification of Jews.

This was an action of debt for penalties under 1 Geo. I. stat. 2. c. 13. s. 17., alleged to have been incurred by the defendant sitting and voting in the House of Commons without having taken the oaths required by law. The defendant, a British born subject, of the Jewish religion, was returned M.P. for Greenwich, in July, 1851; and on the twenty-first of that month, before taking his seat and voting, he attended at the table of the House of Commons, and demanded to have the necessary oaths administered to him on the Old Testament, stating that that was the mode of swearing which he held binding on his conscience, and in this form he took the oaths of allegiance and supremacy; but in taking the oath of abjuration, he adopted the form of the oath prescribed by 6 Geo. III. c. 53., but purposely omitted the words "on the true faith of a Christian." He refused to take this oath without these words being omitted, and offered to subscribe the oath he had so taken, but was not allowed to do so.

Held by the Court of Exchequer (the judgment being confirmed in the Exchequer Chamber), that the stat. 6 Geo. III. c. 53. is still in force, and that the words omitted by the defendant were of the substance of the oath thereby prescribed; that the defendant had therefore not taken the oath required by law, and was liable to the penalties sued for.

11. *BENHAM V. THE UNITED GUARANTEE AND LIFE ASSURANCE COMPANY.* 7 Exch. 744.

Policy of Indemnity—What amounts to a Warranty in.

This was an action on a Policy of Guarantee for the fidelity of one Robert Weir, as the secretary of the Marylebone Literary

Institution, of which the plaintiff was treasurer. The policy recited as the basis of the contract of guarantee a certain statement in writing by the plaintiff, of the truth of his answers to certain questions therein contained, amongst which questions was the following: "In what capacity do you intend to employ the applicant? and with reference to this question state, as far as circumstances will permit, (A.) the nature of his intended duties and responsibilities? (C.) The checks which will be used to secure accuracy in his accounts, and when, and how often, they will be balanced and closed?" To these questions the defendant answered, (A.) "He is secretary of the Marylebone Literary Institution, of which I am treasurer; (C.) examined by finance committee every fortnight."

Held, that this last statement was not a warranty, but a mere representation of intention, and that the plaintiff was entitled to recover in respect of a loss through the dishonesty of Weir, although caused by the neglect to duly examine the accounts.

12. **CAMBISCO v. PACIFICO.** 7 Exch. 816.—**COBBETT v. HUDSON.**
1 E. & B. 11.

Practice — Foreigner — Security for Costs — Evidence of Party advocating his own Case.

The plaintiff in *Cambisco v. Pacifico* was a foreigner, usually resident at Athens, and the defendant applied for security of costs. The affidavits stated that the plaintiff came to this country for the temporary purpose of bringing the action, and the plaintiff swore that he intended to remain here until he obtained judgment.

The Court of Exchequer, on the authority of *Dowling v. Harman*, 6 M. & W. 131., refused to compel the plaintiff to give security for costs.

Mr. Cobbett, the plaintiff in the second of the above cases, who sued in *formâ pauperis*, acted as his own counsel at the trial, and having addressed the jury, tendered himself as a witness. The Lord Chief Justice rejected his testimony, and the Court of Queen's Bench held that his testimony was improperly rejected, the 14 & 15 Vict. c. 99. s. 2. giving a party to a suit a right to give evidence on his own behalf, and that this right was not forfeited by his conducting his own cause at the trial, and addressing the jury as an advocate; but the L. C. J. added, "we may hope that, without any positive rule against a party addressing the jury, and being examined as a witness on oath on his own behalf, a practice so objectionable is not likely to spring up, for it is not

only contrary to good taste and good feeling, but, as it must be revolting to the minds of the jury, it will generally be injurious to those who attempt it."

13. *REGINA V. THE YORK AND NORTH MIDLAND RAILWAY COMPANY.* 1 E. & B. 178.—*YORK AND NORTH MIDLAND RAILWAY COMPANY V. REGINA.* 22 Law J. Q. B. 225., 1 Common Law Reports, 119.—*REGINA V. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.* 1 E. & B. 228.—*REGINA V. AMBERGATE, NOTTINGHAM, AND BOSTON RAILWAY COMPANY.* 1 E. & B. 372.

Public Company—Mandamus—Obligation of Compulsory Powers.

The York and Midland Railway Company in 1846 obtained an Act of Parliament which, after reciting "that it would be attended with local and public advantages if a railway were formed from York through Market Weighton and Cherry Burton to Beverley, &c., and that the above Company were willing to execute the same," enacted, "that it should be lawful for the Company to make the proposed railway." By a second Act, in 1849, the Company were authorised to abandon part of the line between Market Weighton and Cherry Burton, and it was provided that it should be lawful for them, instead thereof, to make a new line between the same two towns.

By the first Act, the compulsory powers to take lands were limited to three years, and the time for making the railway to five years; after which time, the powers granted to the Company were to cease, except as to the parts of the line completed, and the land of the uncompleted part, if it had been taken by the Company, was to revert to the landowners. By the second Act, the time was extended; but a longer period was granted for the exercise of the compulsory powers in respect of the deviation line than in respect of the original line.

The Company completed the line from York to Market Weighton only, and did not make the rest on the ground that it would not be remunerative. After the compulsory powers of the Company to take land for completing the line from Cherry Burton to Beverley had expired, but while the powers still continued with regard to the substituted line under the second Act, a Mandamus was applied for by persons whose lands had been taken for making the completed portion of the line, and also who had land on the new proposed line, to compel the Company to make the substituted line between Market Weighton and Cherry Burton.

Held by the Court of Queen's Bench (Erle J. dissentiente), that the Company could be compelled by *Mandamus* to complete the entire line, so far as was practicable; and that it was no answer that such uncompleted line would be superfluous, inconvenient, or unremunerative, or that the funds of the Company would, in all reasonable probability, be insufficient.

Held by the Exchequer Chamber that the statutes gave a power to the Company, but did not oblige them to make the railway. That they contained no implied contract between the Company and the landowners along the proposed line, that the railway should be made; and that the Company, by making part of the line, had not thereby put themselves under an obligation to make the remainder.

In *Regina v. Lancashire and Yorkshire Railway Company*, a *mandamus* was issued against the defendants to compel the performance of the contract with the public and the landowners, made binding by their Act of Parliament. They made a return to the *Mandamus*, merely alleging that they had taken no step, either by purchase of lands or otherwise, for making the railway; and this was held to be insufficient.

In *Regina v. Ambergate, Nottingham, and Boston Railway Company*, the defendants, in return to a *Mandamus* to complete a railway pursuant to their Act of Parliament, incorporating the "Lands Clauses Consolidation Act, 1845," (the stat. 8 & 9 Vict. c. 18.), stated (*inter alia*) that the undertaking was one to be carried into effect by means of a capital to be subscribed by the promoters, and that the capital had not been subscribed for under a contract pursuant to § 16. of the last-named Act, nor could the defendants then, or at any other time, procure it to be subscribed for. And the Court of Queen's Bench held that the return was good, as it showed that a compliance with the command in the writ, which would necessitate the exercise of the compulsory powers, would be illegal.

14. *TALLIS v. TALLIS.* 1 E. & B. 391.

Restraint of Trade—What an unreasonable Covenant.

The plaintiff and defendant had carried on the trade of publishers in partnership; a part of their trade, called the *Canvassing Trade*, consisting in publishing books in numbers, and employing travellers to sell them by canvassing for purchasers. By indenture of dissolution reciting these facts, it was agreed that plaintiff should

retain the whole of the partnership stock, and should indemnify defendant against all liabilities, and pay him a large sum of money. Defendant (*inter alia*) covenanted, not directly or indirectly, to be concerned in the canvassing trade in London or within 150 miles of the General Post Office, nor in Dublin or Edinburgh, or within 50 miles of either, nor in any town in Great Britain or Ireland, in which plaintiff or his successors might at the time have an establishment, or might have had one within the six months preceding. In an action brought on this indenture, the breaches laid in the declaration were, that the defendant was engaged in the trade within 150 miles of the General Post Office, and also in Manchester and Liverpool, where the plaintiff, at the time of the breaches, had establishments.

Held by the Court of Queen's Bench, that the restraint was reasonable, although it extended to works other than those published by the plaintiff, and to places where the plaintiff had no establishment or place of business.

Contracts in restraint of trade are now construed by the Courts more liberally than they were in former times. In the leading case of *Mitchel v. Reynolds*, commented on in 1 *Smith's Leading Cases*, 171., it was laid down that the Court must see that the contract was made upon adequate consideration; but in *Hitchcock v. Coker*, 6 *Ad. & Ellis*, 438., it was held, the only question as to consideration was, whether it was a legal one of value, without reference to the quantum of that value. With regard to time, it was in the latter case held that the restriction might be unlimited; and with respect to space, it has been held in a variety of cases, which are cited in the notes to *Smith's Leading Cases*, that hardly any definite limit is unreasonable, provided it be necessary for the protection of the party requiring it. Thus, whilst the area of exclusion in the case of publicans and beer-shop keepers may be limited to one mile with perfect safety to the successor in the business sold, it has been held valid for a solicitor to exclude himself from practice in any part of the kingdom. *Whittaker v. Howe*, 3 *Beav.* 383.; *Nicholls v. Stretton*, 10 *Q. B.* 346.

15. *HUBBERSTY AND ANOTHER v. WARD.* 8 *Exch.* 330. — *LAVERRON v. DRURY.* 8 *Exch.* 166.

Shipping — Bill of Lading — Authority of Master — Liability of Owner — Damage by Rats.

Hubbersty v. Ward was an action of trover for 145 quarters of wheat. The plaintiffs were merchants at Hull, and the defendant

the owner of the sloop "Celerity," of which one Simpkin was master. In April, 1852, one Potterill undertook to load the "Celerity" with wheat for Antwerp, and put on board, in the first instance, 229½ quarters, for which Simpkin signed a bill of lading in favour of Hans and Co., who had made advances to Potterill. On the 13th April, Potterill put on board 75 quarters more, for which Simpkin also signed a bill of lading in favour of Potterill, who immediately endorsed it to the plaintiffs, to secure an advance from the plaintiffs upon it. A few days afterwards Potterill shipped 70 quarters more, and obtained a similar bill of lading, which was also endorsed to plaintiffs for further advances. After this transaction Potterill applied also to Hans and Co. for an advance upon the two parcels of 75 and 70 quarters; and Simpkin, at Potterill's request, erroneously signed a further bill of lading for 145 quarters, as shipped by Hans and Co.; and the whole cargo was subsequently delivered under the two bills of lading for 229½ and 145 quarters. *Held* by the Court of Exchequer, that the plaintiffs were entitled to recover, on the bills of lading for 75 and 70 quarters; the master having no authority to sign the bill of lading for 145 quarters, the goods not having been actually shipped.

Laveroni v. Drury. This was an action for damages sustained by injury to a certain quantity of Parmesan cheese, shipped by the plaintiff in the defendant's ship, "Anne Sophia," from Genoa to London. The goods were shipped under bills of lading, which were for the purposes of the case assumed to be in the ordinary English form, and the loss was proved to have been occasioned by rats during the voyage, although it was also proved that there were two cats on board. *Held* by the Court of Exchequer, that the damage not being within any of the exceptions in the bills of lading, the defendants were like common carriers liable for the loss.

16. *WILSON v. ZULUETA.* 14 Q. B. 405. — *HOLMES v. SIXSMITH.*
7 Exch. 802.

Stamp — Agreement — Evidence from, when unstamped.

Wilson v. Zulueta was an action for breach of an agreement to hire plaintiff as stoker from England to Havana, at 5*l.* per month wages, and 2*l.* per month for provisions (rations to be served out on the outward voyage); the agreement to be in force for one year, and plaintiff to be paid three months' wages if discharged before that time. *Held*, 1st, that the agreement did not require a

stamp, being within the exemption, "memorandum or agreement for the hire of any labourer," in statute 55 G. III. c. 184. Schedule, part 1. tit. Agreement.

2nd. That defendant was liable for not serving out rations, by discharge of plaintiff before he arrived at Havana, and by the non-payment of three months' wages in advance. (Downman & Williams, 7 Q. B. 103., and the authorities there cited.)

In *Holmes v. Sixsmith* the action was brought to recover 100*l.* deposited with the defendant as stakeholder. The plaintiff entered into a written agreement with a third party to race their horses upon certain terms; and he deposited the amount of his stake with the defendant. The race was run, and the plaintiff's horse was beaten; but he afterwards discovered that the whole transaction was a concocted fraud, and gave notice to the defendant not to pay over the money. *Held*, on the authority of *R. v. Gompertz* (9 Q. B. 824.), and *Coppock v. Bower* (4 M. & W. 361.), that the written instrument, although unstamped, was properly admitted in evidence in proof of the fraud.

17. *MACDOUGALL v. PATERSON.* 11 Com. Bench, 755.

Statute — Discretionary and imperative Powers under.

The 13th and 14th Vict. c. 61. s. 13. provides, that if in certain actions brought in the Superior Courts for sums less than 20*l.* the plaintiff shall make it appear to the Court or a Judge that the action was brought for a cause in which concurrent jurisdiction is given to the Superior Courts, or for which no plaint could be entered in the County Court, &c., thereupon the Superior Court or a Judge *may* direct that the plaintiff shall recover his costs. Held by the Court of Common Pleas, upon the authority of *Rex v. Barlow*, 2 Sal. 609.; *Backwell's case*, 1 Vern. 152.; *Reg. v. Tithe Commissioners*, 14 Q. B. Rep. 459.; and, contrary to *Jones v. Harrison*, 6 Exch. 328., that the statute conferred upon the Court and Judges a power, the exercise of which depended not upon the discretion of the Court or Judge, but upon the proof of the particular case out of which such power arises.

POSTSCRIPT.

CHARITY TRUSTS ACT.

AT LENGTH we have this important measure carried, the new jurisdiction created, and its functionaries appointed. Great praise is due to the Lord Chancellor for his determination that it should no longer be postponed, and for the mingled firmness and conciliation with which he presided over the progress of the Bill. The members of the late Government are also well entitled to our thanks for the able assistance which they gave, and the valuable improvements which they effected upon the measure in the Local Committee. Ample testimony has been borne to their merits by Lord Brougham¹, a member of that Committee, and who must be presumed to have jealously watched the conduct of the business, as the subject had originated with himself. We observe, however, that he complains much of the delay which has attended the passing of this Bill. It might just as easily have been passed in 1846, the year after Lord Lyndhurst brought it in; and in that year it assuredly would have passed but for the factious proceedings which made one party oppose the Bill in order to punish its authors for having repealed the Corn Law, and another in order to shake the Ministry of their antagonists, neither party having probably the least dislike of the Bill, but both, for opposite reasons, disliking its authors,—one wishing to turn them out, the other wishing to take their places. The result of this proceeding has been, that seven years have been wholly lost, during which a great part of the abuses prevailing in the thirty thousand existing charities might have been extirpated, and, what is of still greater moment, the more useful application provided of the vast funds at present in very many cases uselessly, and in not a few hurtfully employed. That property has been estimated at a million and a half yearly income, and the estimate is undoubtedly below the real amount, inasmuch as, notwithstanding all the exemptions from the inquiries of the former Commissions (exemptions including the universities, great schools, and cathedral and collegiate bodies), the income reputed was £1,600,000, notwithstanding all the malversation and mismanagement by which it was cut down.

But it is needless to repine at the most unnecessary post-

¹ Letter to Lord Denman, *antè*, p. 155, in this Number.

ponement of this measure. We must now look forward to the benefits which it is fitted to confer upon the community; and these will be in proportion to the fitness of the persons who have been entrusted with the jurisdiction now at length created. Much objection has been made in the profession to their appointment being vested in the Government; that is, in the heads of the three departments—Treasury, Home Office, and Chancery—instead of being, as they are truly judicial offices, cast upon the undivided responsibility of the Great Seal. We entirely join in this view of the matter; but we believe that nothing in the least approaching to party or political bias has been shown in the selection which has been made. Professor Jones, a person of great learning and talents, well versed in business, as having for many years been a leading member of the Tithe Board, was also a most appropriate member of the new Commission, which has to dispose of so many questions relating to charities connected with the Church, he having been the Archbishop's nominee on the Tithe Commission. But his well-known liberal opinions, and his scrupulous love of justice, as well as of toleration, render his appointment in every way satisfactory. Mr. Erle, the Chief Commissioner, is a gentleman distinguished for his ability and learning as a conveyancer: and he is known to have drawn the Succession Duties Bill, certainly one of the most difficult tasks ever undertaken by a professional man, a task allowed by all to have been admirably performed—on this there can, we apprehend, be no doubt, however much men may disapprove of the tax itself, which plunges us deeper than before in the prodigal course of living upon our capital, contrary to every rule of common prudence for an individual, or of sound policy for a State. Mr. Hill is known as a lawyer who has devoted much of his attention to the subject of charitable trusts, and as the author of the useful Book on Trustees. It is very possible that Lord Lyndhurst (than whom there never was a better Chancellor, nor a more useful, though perfectly unpretending friend to Law Amendment, both in and out of office) might have endeavoured to save the public money, by abandoning his own patronage, and prevailing on some of the retired Masters in Chancery (those whom Sir George Rose calls *Masters after the possibility of reference extinct*) to take these places, for which their previous habits peculiarly fitted them, as he had intended in his Bill of 1845 and 1846, and as he tried to make Lords Brougham and Cottenham take the newly-created places of Vice-Chancellor in 1841. It is, however, more

than probable that Masters *after the possibility* would have refused like ex-chancellors; and we therefore cannot very much blame those who abstained from making what they probably thought a desperate attempt.

The greatest defect in the plan is the limited number of inspectors. Only two of these most important functionaries to examine so many thousands of charities in all parts of the country, appears a preposterous arrangement; and we feel afraid of the consequence being to bring early discredit upon the working of the whole machinery. A discretion ought certainly to be vested in the Board, of appointing additional inspectors, if not permanently, at least for particular inquiries.

When we have complained of the delay in carrying this Bill, there is certainly no part of that delay imputed to Lord Truro. Whatever may at any time have been laid to his charge, of raising impediments in the way of Law Reforms, on the two great measures of Chancery Reform and Charitable Trusts, he stands not only unassailable, but entitled to the greatest commendation. His admirable conduct on the former subject we have more than once had occasion to explain and extol. It was no fault of his that the Charitable Trusts Bill, introduced and ably supported by him, did not pass in 1851. He carried it through the Lords, and it shared the fate of most other measures in the Commons, where, after months spent in wrangling and squabbling, and debates as endless as they are useless, a few weeks remain before the prorogation, within which the whole *work* of a Session of mere *talk* is crowded; and, of course, most of it is left undone. We implore the reader's reperusal of our discussion on this crying grievance in the sixteenth number of our Journal. It places the Constitution in real peril.

M. ARAGO.

THE irreparable loss to the scientific world of this illustrious philosopher can hardly be suffered to pass without remark even by a journal devoted to Jurisprudence, regard being had

¹ He added, "C'est que le vide, que certains hommes laissent après eux, est encore plus grand que nos craintes mêmes n'avaient pu nous le représenter, et que nous n'en découvrons toute l'étendue, que lorsqu'il s'est fait."

to the mutual relationship in which all the sciences stand towards each other.

“Habent quoddam commune vinculum.”—*Cic. Pro Arch.*

But M. Arago was a statesman also; he both held a most eminent place among politicians, and had at one period a foremost position among the rulers of his country,—a period marked by important measures connected with the system of the Law. In that capacity his scrupulous integrity, the absolute purity of his whole conduct, and, above all, the perfect disinterestedness with which he devoted himself to the service of the State, as far removed above the very shadow of suspicion of sordid motives, as ever was an old Roman in the best times of the Republic,—have been often the subject of unstinted praise, even from those whose opinions most widely differed from his, and who were the most opposed to his government. He was, in fact, a thorough Republican in his principles, and conscientiously attached to that scheme of polity. But he was, because of his honest and sincere devotion to those opinions, tolerant of the opposite principles, and incapable of oppressing those who held them.

This is not the place for recounting his achievements in science, which, with his dignified character and his kindly disposition, had at once established his influence among his brethren in the Institute, and endeared him to them. His loss was a blow which, though dreaded for months, fell as heavily as if it had been unforeseen, according to the striking remarks of his truly distinguished colleague, M. Flourens, in the eloquent and touching oration pronounced at his grave.¹ But we must advert to one part of the Provisional Government's conduct, often made the subject of very unfavourable remarks,—that regarding the removal of Judges, because it is very possible that M. Arago agreed with his colleagues, certainly took no steps to evince a difference with them on this important matter. Whatever sound general principles may dictate as the rule, the inferences not unnaturally drawn from the conduct of Judges during the successive changes in the French Government, must be allowed to have almost unavoidably influenced the sentiments of practical statesmen, and will easily explain their deviation from the line traced by rigorous theory. The great majority of persons in judicial stations had worn the aspect of Buonapartists before the Revolution; had then been noted for their loyalty to the elder branch of the Bourbons; had for-

gotten Charles X. while the Orleans family ruled; and without any revived recollection of Napoleon, had loudly hailed the Republic which set aside all Bourbon branches; and were possibly supposed ready to forget the Republic, and even once more remember Napoleon, in case a further change should come over the face of affairs! We certainly hold by our fixed opinion, that nothing can justify any inroad upon judicial independence; but we are bound in candour to make allowances for the different feelings of those who had so often witnessed how little that independence had proved able to sustain the stern virtue of the Judge.

Certainly it must be admitted that M. Arago had more than most persons a right to feel disgust and scorn at the changes so often witnessed in so many of the more distinguished members of French society in its various departments—he who had never been in any season the courtier of the powers that be. His noble conduct very early in life, when he successfully resisted the base attempt made to remove the illustrious Carnôt from the Institute at the Restoration, will be for ever borne in remembrance by the world of science and of politics. The youngest member of that body, by his gallant proceedings, saved it from a stain with which older and time-serving philosophers would have tarnished its name. Napoleon, to his great honour, rewarded that act of virtue with the Grand Cross of the Legion of Honour, though it must have cost him a pang when he reflected that he had himself, at the same time of life, not scrupled to take Carnôt's place (who had been his patron), when the tyranny of the other Directors had proscribed their great colleague, and the slavish Institute had expelled him, truckling to the despots of the day.

It may well be added to this note, regarding the judicial proceedings of the Provisional Government, that they received the sanction of a much respected magistrate, Dupont de l'Eure. We are far from asserting that this was sufficient to justify them; but it certainly could not have been expected that, in the face of such professional authority, any one unconnected with the magistracy should have opposed them.

THE
LAW REVIEW.

ART. I.—A MEMOIR OF LORD PLUNKET.¹

THE subject of this Memoir may well show us the change that has recently come over our estimate of public men in this country, but more especially of great lawyers, in one important particular. If we look to the leading men, now in either House of Parliament (and those connected with Ireland are certainly no exception), we shall find them all more or less distinguished as Reformers of the Law. No lawyer, indeed, can pretend to the great offices of the State without making good his claim to some distinction in this department of statesmanship. The day of the mere lawyer is over; something more is now required even for Attorney Generals and Chief Justices. This was not so “when good Lord Eldon ruled the land.” No such requirement was made when Lord Plunket carried away the great prizes of life, and bore down in Ireland all before him. It is not, then, as a Law Reformer that we call attention to his life and character; but as a great orator, a consistent statesman, a most able advocate, and an eminent judge, Lord Plunket deserves some notice in these pages. He lived a long life in an eventful period, and he took a prominent part in many important passages of history.

William Conyngham Plunket was the second son of a Presbyterian Minister, of Scotch extraction. His father was the pastor of a congregation, first at Enniskillen, and after-

¹ The name was frequently spelt with a double t. We believe, however, the spelling as above to be more correct.

wards at Strand Street Chapel, Dublin. He had two sons, both of whom were educated to liberal professions. The elder brother, Patrick, practised successfully many years in Dublin as a physician. The second son, William, born in July 1764, was brought up to the Bar. He was educated at Trinity College, Dublin, where he obtained a studentship and otherwise distinguished himself, not only in his studies but in the Historical Society, a well-known debating club much frequented by the college students. It is understood that he declined a fellowship; after taking his degree he was called to the Bar in 1787. But his attainment of this position was not unattended with difficulty. It is to the honour of the father of these two boys that, as he died in debt and without being able to make sufficient provision for their education, the funds necessary for these purposes were provided by his congregation. It is to the honour of the sons, that when by this kindness they had been enabled to reach eminence in their respective professions, this money so advanced was returned by them to the members of the congregation of Strand Street Chapel; and it may be mentioned to their honour, as appears by a communication made since Lord Plunket's death, that these members declined to apply it to their own benefit, but made it over to the trustees of the chapel to be employed in furtherance of its objects.

William Plunket having thus early gained the sympathies of many respectable persons, had further, the inestimable lesson thus practically conveyed to him, that it must be by his own exertions alone that he could repay the debt thus contracted and attain any eminence in his profession. This lesson, which has made more eminent lawyers than any university, was so well learnt by young Plunket, that he soon obtained notice and practice at the Bar.

At the time, however, at which he entered this profession it was almost impossible for a barrister, even a young barrister, not to be involved in politics. In our own quiet days it is probably most safe, but at any rate it is practicable, for a man to remain many years at the Bar, and not perhaps to know himself what his political convictions are, but he may certainly if he chooses confine that knowledge to himself. But

in Dublin, in the stormy years which closed the eighteenth century, this was not to be done by the most prudent or cold-blooded. To say nothing of the exciting events which then happened in France, and which stirred the soul of every thinking man to its inmost depth, Ireland was the scene of the most violent commotion. An insurrection, to which religion gave intensity and which was supported by a foreign fleet, alarmed the more peaceful inhabitants and half gained the sympathies even of many well-meaning persons. State trials, suicides, and murders were events of constant occurrence; and the panacea proposed by the Government for all these troubles—a union of the two kingdoms—was strongly opposed by the great Liberal party in both countries. Indeed, although now after the lapse of more than half a century few persons would wish to disturb the Union, yet it must be remembered that at the time at which it was brought forward, it appeared to most true Irishmen¹ of very questionable policy, and was only carried by the wholesale distribution of money and peerages mistakenly called honours. But one great difficulty which beset the opponents of the Union was the danger of appearing to favour the treasonable projects of those who, while they shouted against the Union, really meant flat rebellion and anarchy. This was felt so strongly by some eminent members of the Opposition that they for a time seceded from Parliament.

In the letters and papers of Lord Castlereagh, and the Memoirs of Mr. Grattan, both recently published, the documents proving this are given; and if any doubt existed before, it is now entirely removed. In one letter this nobleman, the “manager” of the whole measure, distinctly insists on *carte-blanche* as to honours to be conferred on persons capable of rendering assistance, and to be given as the price of votes in the House of Commons; and in other papers the money value of all the Irish boroughs and interests is set down and summed up.

This, then, was a time when politics entered into the business of life, and when barristers, young and old, might

¹ Sheridan, for instance, declared to Grattan, “he would fight against it up to his knees in blood.”

well be excused for engaging—nay, were compelled to engage—in the contest. The leaders of both parties were, of course, anxious to secure the services of persons able to take part in the great struggle. In Lord Castlereagh the Government found a man who, under a front smooth and polished as ice, hid an indomitable spirit determined to carry the measure intrusted to him by the means we have alluded to, which, if not foul, can hardly be called fair. As all the power and influence of the Government were enlisted with undue severity on this side, the leaders of the Liberal party were determined to press into their service all the aid that was available. Lord Charlemont, as the leader of the Liberal party in Ireland, was most active in the cause. He sent his son, Lord Caulfield, to contest the town of Armagh; and, among others, he thought that William Plunket¹ might be useful in the House of Commons. In a letter from Lord Charlemont to Dr. Halliday, dated Nov. 4. 1797, we find the following passage:—“Notwithstanding your Parliamentary apathy, you will, I doubt not, hear with some satisfaction that two excellent men, Frank Dobbs and Plunket, are likely to take their seats in the approaching Parliament. The character of the latter is incomparable both for abilities and principles.” (*Hardy's Life of Lord Charlemont*, vol. ii. p. 387.)

Plunket was returned for Lord Charlemont's own borough of Charlemont (for which Grattan had been previously returned by the same discerning nobleman), and soon distinguished himself by the skill and boldness of his attacks on the Government. That Lord Charlemont did not repent his choice, we shall soon see.

Mr. Plunket made his first speech on the 5th of March, 1798, on a motion for a Committee to inquire into the state of the country. This speech caused great sensation. His services were then the more important, because in that year, as we have said, many of the Opposition had seceded from the House of Commons, and Grattan, Curran, Hardy, and Fletcher were away. The reason for this secession is thus

¹ The elder brother attended Lord Charlemont professionally. See *Life of Hardy*, vol. ii.

stated by Mr. Grattan¹: — “ We did not approve of the conduct of the United Men, and we could not approve of the conduct of the Government. We were afraid of encouraging the former by making speeches against the latter, and we thought it better in such a case, as we could support neither, to withdraw from both ;” and he regrets that the Opposition had not seceded earlier.

Well, then, might Lord Charlemont write on March 20. 1798, as follows: “ Dobbs has fully equalled my expectations, and will daily improve ; Plunket has exceeded them, and is already one of the best and most useful debaters.” Under these circumstances he rose at once to be a leader.

Not only was the Senate thus excited, but the Bar was also in a flame. In the confidential letters of Mr. Cooke (the Under Secretary of State) to Lord Castlereagh, given in the Papers recently published, we find such passages as the following, alluding to many barristers afterwards eminent : —

“ I hope you like the lawyers’ protest. Bushe is writing ; Barrington is writing, Jebb is writing, all against [the Union]. Dec. 15. 1798.”

And then, next day,

“ Bushe, Barrington, and Jebb come forth in print to-morrow.”

And again,

“ Pamphlets swarm. They say, ‘ Cease your funning,’ in Barrington’s ; Jebb’s is moderate, and admits a great deal to the purpose.”

Dr. Duigenan, King’s Advocate, thus writes about the same time : —

“ The Irish Bar led the way in this premature opposition. In short, the tide of opposition runs strong at present, &c. The Prime Serjeant (Fitzgerald) having been dismissed for his opposition to the Union, the Lord Lieutenant writes to the Duke of Portland, ‘ The Bar has entered into resolutions to give the Prime Serjeant precedence as at present. They met with the proper rebuke this morning from the Chief Judges, particularly the Chancellor, in their respective Courts.’ Jan. 25. 1799.”

¹ Life and Times, by his Son, vol. iv. p. 345.

We find an account of this transaction in Mr. Grattan's Memoir:—

“Among other dismissals, Mr. James Fitzgerald was dismissed from the office of Prime Serjeant, in consequence of his differing in opinion on the Union with the Government. The Bar, however, resolved to support Mr. Fitzgerald, and to give him the precedence he had enjoyed when in office. This was thus arranged. On the first motion day after the dismissal, the Attorney and Solicitor-General having made their motions, the Chancellor (Lord Clare) called on Mr. Smith, the father of the Bar, who bowed and said Mr. Saurin had precedence of him; he then called on Mr. Saurin, who bowed and said Mr. Ponsonby had precedence of him. Mr. Ponsonby, in like manner, said Mr. Curran had precedence; and Mr. Curran said he could not think of moving any thing before Mr. Fitzgerald, who certainly had precedence of him. The Chancellor then called on Mr. Fitzgerald, who bowed and said he had no motion to make, and this caused the Chancellor to speak out:—‘I see, Gentlemen, you have not then relinquished the business; it would be better at once for His Majesty's Counsel, if they do not choose to conform to the regulations of this Court, to resign their silk gowns, *than sit there in a sort of rebellion against their Sovereign*. I dismiss the causes in which these gentlemen are retained with costs on both sides.’ And thus saying, Lord Clare left the Bench. *The attorneys immediately determined they would not charge any costs.*”

The great majority of the profession were thus Anti-Unionists, and in a memorandum by Lord Castlereagh, dated Feb. 1. 1798, this opposition is thus accounted for:—

“The barristers in Parliament look to it (the Union) as depriving them of their best means of advancement and of their present business in the Courts, if they support it, *the attorneys having formed a combination for this purpose.*”

This is a curious illustration of the attorney-power, extending as it would seem to an attempt to prevent the Union.

These were, however, stirring times, and called forth feelings the most bitter and language the most impassioned. Plunket was night after night at his post, uttering those burning words which the occasion seemed to demand. In these periods of history it is difficult to define accurately what part of the Opposition is borne by each great leader, and it

was not altogether unwarrantable to suppose, that he who constitutionally opposed the Union, and yet constantly mixed with those who would have risen in rebellion, and even called in foreign aid to assist it, shared the feelings of the latter class of politicians. It was alleged that Plunket, the friend and guest of the Emmetts and others guilty of treason, joined in and even originated their designs. So far from there being any evidence of this, we shall see that at an after period of his life Plunket challenged inquiry into it and came off victorious. But, in opposing the Union, he spared no exertions, and we may well say that in taking this part he deserved better of his country than those who seceded from their places under circumstances so difficult.

Notwithstanding the overbearing conduct of the Chancellor, the Bar met in Dec. 1798, and carried a resolution against the Union by a majority of 166 to 32. In the list¹ of those who opposed the Union is the name of, as we may conceive, W. C. Plunket.

Thus gloomily closed the eventful year of 1798, by which time the plan of the Union was developed.

On the 22nd of January, 1799, the debate on the Union was renewed, and on this occasion Mr. Plunket made one of his most famous speeches. A previous speaker, Barrington, Judge of the Admiralty, having charged the Ministers with corruption, a member on their side of the House moved that the words be taken down. Plunket boldly reiterates the charge, and thus effectively employs the weapon that had been attempted to be used against his party.

“I had been induced to think that we had at the head of the Executive Government in this country a plain honest soldier, unaccustomed to and disclaiming the intrigues of politics, and who, as an additional evidence of the directness and purity of his views, had chosen for his secretary a simple and modest youth (*puer ingenui vultus ingenuique pudoris*), whose inexperience was the voucher of his innocence, and yet I will be bold to say that, during the vice-royalty of this unspotted veteran, and during the administration of this unassuming stripling within these last six weeks, a

¹ Printed by Mr. Grattan, vol. v. p. 16., who gives also the names of those who were favourable to it, distinguishing those who were afterwards promoted to Judgeships and other offices, — a very large and melancholy majority.

system of black corruption has been carried on within the walls of the Castle which would disgrace the annals of the worst period of the history of either country. *Do you choose to take down my words?* I need call no witnesses to your Bar to prove them. I see the right honourable Gentlemen sitting within your walls who had long and faithfully served the Crown, and who have been dismissed because they dared to express a sentiment in favour of the freedom of their country. I see another honourable Gentleman who has been forced to resign his place as Commissioner of the Revenue because he refused to co-operate in this dirty job of a dirty administration. Do you dare to deny this? I say that at this moment the threat of dismissal from office is suspended over the heads of the members who now sit around me, in order to influence their votes on the questions of this night, involving every thing that can be sacred or dear to man. *Do you desire to take down my words?*"

Whilst this thunder rolled over their heads, the Government members sat appalled; the luckless wight who had talked about taking down the words, knew not where to hide his head, and no one dared to take up the gauntlet thus boldly thrown down.

In the Irish House Plunket devoted himself almost entirely to the subject of the Union; but in this, as afterwards on that of the Catholic claims, he made himself feared by one party, and loved and admired by the other. He could, however, speak on any question which he chose to take up, and made a most effective speech on the French war in 1815.

The truth of the charge of wholesale corruption, indeed, is now placed beyond doubt; for the proofs we need only refer to the voluminous and authentic works very recently published containing the public and private documents and memorandums of two of the great leaders in this memorable period of our history.¹

Besides the active proceedings in Parliament, other means were taken out of doors. "The party," says Mr. Grattan, "patronised the Constitution paper," and set up the "Anti-Union." It was in the latter that they chiefly wrote, and in the former that their speeches were chiefly published. Mr. Peter Burrowes, Mr. Plunket, Mr. Bushe, Mr. Wallace,

¹ Castlereagh Papers, and Memoirs of Grattan.

Mr. Goold, and Mr. Smiley, were the chief contributors to the Anti-Union. Mr. Plunket was said to be the author of the article called *Sheela*, 2nd vol. of *Dublin Magazine* for 1799. On the other hand, the Government were not idle. At a meeting of its friends, the persons who were to support the articles of the Union were brought forward. Mr. Daly¹ declared (these were his words) *that his line had been taken, and that each of them must select their man, and that he had chosen his antagonist already.* It was said that they had singled out their men,—that Lord Castlereagh should attack George Ponsonby, Corry Mr. Grattan, *Daly Mr. Plunket*, Toler Mr. Bushe, and Martin Mr. Goold. These individuals had been set on by the Castle, and encouraged to fight; “and they did very well what they were paid for,” so says Mr. Grattan.² This was called the “Pistolling Club,” and thus was this measure conducted and carried through.

It need hardly be said that Plunket was not moved one jot by this sort of braggadocia. On the 15th of January, 1800, the Irish Parliament met for the last Session; and Mr. Plunket opposed Lord Castlereagh, disdaining any less antagonist, as vehemently as ever. He reiterated his charge of corruption: “I state it as a fact, that you cannot dare to deny that 15,000*l.* a-piece is to be given to certain individuals as the price of their surrendering—what! their property? No: but the rights of representation of the people in Ireland; and you will then proceed in this, or in an imperial parliament, to lay taxes on the wretched natives of this land to pay the purchase of their own slavery. From these acts of despotism you plunge into the phrensy of revolution at a time when this political madness has desolated the face of the world, when all establishment is staggering under the drunkenness of theory.”

Thus did he at this moment warn the Government and his own party of the excess to which the revolutionary spirit might be carried.

“His style,” says Mr. Phillips³, “was peculiar, and almost quite

¹ Afterwards made a Judge of the King's Bench.

² Vol. v. p. 74.

³ Curran and his Contemporaries, 4th Edition; to which we are much indebted.

divested of the characteristics generally to be found in that of his countrymen. Strong cogent reasoning, plain but deep sense, earnest feeling and imagery, seldom introduced except to press the reasoning or to illustrate it, were the distinguishing features of his eloquence; he by no means rejected ornament, but he used it severely and sparingly, and though it produced its effect, it was not directly, but, rather, collaterally and incidentally. He always seemed to speak for a purpose, never for mere display, and his wit, like his splendour, appeared to be struck out by the collision of the moment. In this, indeed, his art was superlative. There were passages which could not have been flung off *extempore*, and must have been the result of very elaborate preparation. The following noble burst, fervid though it is, seems to me stamped, particularly in its commencement, with the impress of deep thought. It is extracted from his Speech on the Union, pronounced in the Irish House of Commons on the 16th of January 1800:—

“There are principles of repulsion; yes, but there are principles of attraction, and from these the enlightened statesman collects the principles by which the countries are to be harmoniously governed. As soon would I listen to the shallow observer of nature who should say there is a centrifugal force impressed upon our globe, and therefore, lest we should be hurried into the void of space, let us rush into the centre to be consumed there. No; I say to the rash arraigner of the dispensations of the Almighty, there are impulses from whose wholesome opposition eternal wisdom has declared the law by which we revolve in our proper sphere, and at our proper distance. So I say to the political missionary, from the opposing system which you object to I see the wholesome law of imperial connection derived. I see the two countries preserving their due distance from each other, generating and imparting heat, and life, and light, and health, and vigour; and I will abide by the wisdom and experience of the ages which are past, in preference to the speculations of any modern philosopher. Sir, I warn the ministers of this country against persevering in their present system. Let them not presume to offer violence to the settled principles, or to shake the attached loyalty of the country. Let them not persist in the wicked and desperate doctrine which places British connection in contradiction to Irish freedom. I revere them both. It has been the habit of my life to do so. For the present Constitution I am ready to make any sacrifice. I have proved it. For British connection I am ready to lay down my life. My actions have proved it. Why have I

done so? Because I consider that connection essential to the freedom of Ireland. Do not therefore tear asunder to oppose each other the principles which are identical in the minds of loyal Irishmen. For me, I do not hesitate to declare, 'that if the madness of the revolutionist should tell me "you must sacrifice British connection," I would adhere to that connection in preference to the independence of my country; but I have as little hesitation in saying, that if the wanton ambition of a minister should assail the freedom of Ireland, and compel me to the alternative, I would fling the connection to the winds, and I would clasp the independence of my country to my heart. I trust the virtue and wisdom of the Irish Parliament and people will prevent the alternative from arising. If it should come, be the guilt on the heads of those who make it necessary.'

As a further specimen of his speeches addressed to an Irish audience, we may give that which Mr. Cobbett and Mr. O'Connell were so fond of quoting against him, not only for its bold invective, but for his reference to what the latter used to call his "young Hannibals," one of whom has now succeeded him.

"Sir," said Mr. Plunket on the Union debate, "I thank the Administration for this measure. They are, without intending it, putting an end to our dissensions. Through the black cloud which they have collected over us, I see the light breaking in upon this unfortunate country. They have composed our dissensions, not by fomenting the embers of a lingering and subdued rebellion,—not by hallooing Protestant against Catholic and Catholic against Protestant,—not by committing the North against the South,—not by inconsistent appeals to local or to party prejudices;—no! but by the avowal of this atrocious conspiracy against the liberties of Ireland they have subdued every petty and substantive distinction; they have united every rank and description of men by the pressure of this grand and momentous subject; and I tell them that they will see every honourable and independent man in Ireland rally round the Constitution, and merge every other consideration in opposition to this ungenerous and odious measure. *For my part, I will resist it to the last gasp of my existence, and with the last drop of my blood; and when I feel the hour of my dissolution approaching, I will, like the father of Hannibal, take my children to the altar and swear them to eternal hostility against the invaders of their country's freedom.*"

"I warn you," he continued, "do not dare to lay your hands on the Constitution. I tell you that if, circumstanced as you are, you pass this Act, it will be a nullity, *and that no man in Ireland will be bound to obey it.*"

"Often enough," says Mr. Phillips, "in after times, did Ireland's agitator found his justification on these impassioned words. He always, however, blinked the commentary which half a century afforded. Little did he refer to the venerable Amilcar, his breathing regular, and his blood hushed, reposing beneath the foliage of old Connaught, ex-chancellor, ex-chief-justice, peer of England. Less did he allude to the only two sons that ever touched 'the altar;' one of them a bishop; and least of all to the remainder of the family, abjuring, in the sunshine of the Saxon sway, all oaths, save those of office and allegiance. A reflecting people might perchance have seen the difference between mere wordy violence and the calmer wisdom of a genuine patriotism."

In 1800 Mr. Grattan returned to the House, having been elected member for Wicklow; and after the oaths, took his seat next to Mr. Plunket. Mr. Grattan, though in a feeble state, spoke in a manner that astonished the House. "When he had ended," says his son, "he left the House, and passing by where Mr. Plunket sat, took him by the hand, and pressed him with a strength that satisfied him that all was right, and as Mr. Plunket used afterwards to say, '*That affair was more conducive to his health than the medicine of all his doctors.*'" This conduct pointed out Plunket as Grattan's successor, and showed how little the latter was capable of jealousy. It was this speech which ended in the too celebrated duel between Grattan and Corry, thus, so far, making good the threat of the Pistolling Club.

These, and similar appeals, were addressed to the Treasury Bench, or rather to the country, for the orator knew that the success of the measure was secure, and that he might alter the opinions, but could not reach the votes of the majority. The Irish House of Commons ceased to exist, and the statesman had to contract his powers to the narrower limits of the Four Courts. Here, however, and on the North-west Circuit, he became the great leader of the day, with all the influence and estimation that are conferred on

men in that rank, and in no place in a greater degree than in the Irish metropolis. His income was also a large one, amounting, it is said, to more than 6000*l.* a-year for many years.

But Ireland was a field too narrow for the ambition of Plunket, and the great assembly of the nation was eventually to acknowledge his sway, and he was destined to walk in the same charmed circle in which Pitt and Fox had recently wielded the magician's rod. And here we cannot but admire the great power of the orator in adapting himself to his audience. This was, perhaps, his most remarkable quality.

"There was a fervour," says Mr. Phillips, "about his speeches in Ireland seldom discernible in his English speeches. Indeed, it always has appeared to me that there is a palpable difference to be found in the style of this great speaker in the Irish and in the Imperial Parliament. In the latter, whether from his more mature years, or from his studiously adapting himself to the genius of the people, he becomes comparatively chastened and severe. Although obnoxious to Grattan's admonition to Flood, that 'an oak of the forest was too old and too great to be transplanted at fifty,' [falsified, however, by Mr. Grattan himself, who was fifty-nine when he entered the Imperial Parliament,] he ventured, after seven years' hesitation, into the English House of Commons. His name was scarcely known there, but on his very first speech he was at once and unanimously recognised as an orator of the highest class. He burst abruptly upon Parliament in all the effulgence of his genius. The almost unexpected appearance of so brilliant a luminary above the political horizon immediately attracted every eye, and fixed the public attention. It stood alone and incomparable. Neither to the two great luminaries which had just set, nor to the lesser lights which still shone, did it, in any portion of its phases, bear resemblance. There was nothing of Pitt's majestic diction, nothing of the fierce vehemence of Fox. The sparkling fancy of Canning was not there, nor Sheridan's adorned declamation, nor Windham's Attic graces. He stood alone, isolated and original. This speech was delivered 1807, and was on the Roman Catholic question."

He had previously been appointed, first, Solicitor-General for Ireland in 1803, and in 1805 Attorney-General, and was more particularly attached to that section of the Whigs

which acknowledged Lord Grenville as their head. He continued in office during the short reign of the Ministry called "All the Talents," and when the death of Mr. Fox broke up that Government he resigned office. While Solicitor-General he was called to vindicate himself from a charge already alluded to. It was often said against him, that having been in habits of intimacy with the Emmetts, father and son, he had on the trial of the latter for high treason unduly pressed a conviction against him. Mr. Cobbett assailed Mr. Plunket, when Solicitor-General, on this ground. In one of the numbers of the "Political Register" he supposes Robert Emmett thus to speak of Plunket:—"That viper whom my father nourished,—he it was from whose life I first imbibed those principles and doctrines which now by their effects drag me to my grave; and he it is who is now brought forward as my prosecutor, and who, by an unheard-of exercise of his prerogative has wantonly lashed with a speech to evidence the dying son of his former friend, while that dying son had produced no evidence, had made no defence, but, on the contrary, had acknowledged the charge, and had submitted to his fate." For this libel Mr. Plunket brought an action against Cobbett, which was tried on May 26. 1804. Mr. Erskine was his counsel, and made one of his usual admirable speeches. The plaintiff recovered 500*l.* damages. Lord Ellenborough, who tried the action, summed up very strongly against Cobbett. "I would ask," he said, "what could give more pain to a virtuous mind than to insinuate that he had acted like our common enemy, 'the seducer ere the accuser of mankind,'—that he had first seduced and afterwards destroyed whom he had first corrupted?" The whole case is fully reported in the twenty-ninth volume of the State Trials.

It was proposed on this occasion to show that Mr. Plunket had, in the Irish House of Commons, made use of inflammatory language. Mr. Foster, the Speaker of the Irish House, having been called by the plaintiff to prove that the libel applied to Mr. Plunket, Mr. Adam¹, counsel for Cobbett

¹ Mr. Erskine made some fun with Mr. Adam and the Whig Club. "This libeller is not satisfied with employing single ball, but canister, grape shot, old

asked him, on cross-examination, "Did Mr. Plunket speak on questions relative to the Union between Great Britain and Ireland? Yes. Do you recollect any of the expressions or arguments he made use of in the course of the debates?" But here, before the answer could be given, Lord Ellenborough sternly interposed: "It would be," said he "a breach of his duty and his oath to reveal the councils of the nation."

But this action was not sufficient to vindicate Mr. Plunket's character. So inveterate is calumny and so delighted is human nature to fix on eminent men some story that may lower them on occasion to the vulgar level. This story met him in another place and in another form, and here also he was able successfully to refute it.

Mr. Plunket entered the House of Commons as member for Midhurst, but he was long a candidate for the University of Dublin, until 1812, however, without success. We are told in Mr. Phillips's book by what means he was then enabled to obtain the suffrages of that learned body; and we mention the facts because they completely clear Plunket's memory from a bitter reproach.

"It was quite understood that Dr. Sandes, afterwards Bishop of Cashel, from his well-won popularity, had the election in his hands. Mr. Plunket called to canvass him, and the Bishop related to me what followed:—'I locked the door,' said he, 'to avoid all interruption,' and at once said, "Mr. Plunket, I know, of course, the nature of your visit. I need not say, I admire your talents and coincide in your political opinions. But I will deal quite candidly with you. My vote and interest you shall never have until you fully satisfy me respecting the part you took on the trial of the unfortunate Robert Emmett." He sat down, entered upon an elaborate explanation, and at the end of an hour I promised the support which made him Member for the University.' The election which founded the fortunes of Mr. Plunket was carried by a very narrow majority (as, I believe, only five), and there could be no doubt that Dr. Sandes decided it."

nails, everything is brought into his battery, and hurled around so as to do the utmost possible mischief. Here is a libel too upon the Whig Club. What will my friend Adam say to this? Gentlemen, I assure you the Whig Club is not a drunken club, nor are its members a noisy rabble."

Let the history of this story lead us to take a charitable view of other statements, made as commonly, and coupled first malignantly, and then thoughtlessly, with eminent names.

In the British Parliament Mr. Plunket spoke but twice in two Sessions, and both times on the same subject. On each occasion he was eminently successful. In the second of these speeches he thus finely alluded to the penal laws:—

“Those mighty instruments, why are they hung up like rusty arms? Does not every man know that they are endured only because they are not executed, and that they never are referred to in any discussion whatever, without pleading their inactivity as the only excuse for their existence? The taste and sense of the public is in this respect a reproach to the tardy liberality of the Legislature.”

In that same speech there is a passage happily combining brilliant eloquence with sarcasm, the more biting because apparently unintentional. It was addressed to Abbot, the Speaker, an opponent of the Roman Catholic claims, and whose duty it was to convey, *ex officio*, the thanks of the House to the generals to whom they had been voted.

After referring to the usage at a Roman triumph, of having a whispered humiliation to lower the victor's pride and a passing allusion to the victories of Wellington, he said:—

“But you, Sir, while you were binding the wreath round the brow of the conqueror, assured him that his victorious followers must never expect to participate in the fruits of their valour, but that they who shed their blood in achieving the conquest were the only persons who were never to share the profits of success in the rights of citizens.”

This was keen, polished, and the more cutting because abundantly deserved. It was suited also to the taste of his audience, and contrasts curiously to the different style in which he thus dealt with Lord Castlereagh in his native Parliament:—

“There are no talents too mean, there are no powers too low, for the accomplishment of mischief. It is the condition of our nature, it is part of the mysterious and inscrutable dispensation of

Providence, that talents and virtues and wisdom are necessary for the achievement of great good ; but there is no capacity so vile or so wretched as not to be adequate to the perpetration of evil.”¹

His speech, also, on the Roman Catholic question, in February 1821, absolutely electrified the House, and drew from Sir James Mackintosh the declaration, that “it proved him to be the greatest master of eloquence and reasoning then existing in public life.” It is a model of cogent and profound reasoning, impassioned declamation, and the happiest historical allusions.

But it affords little opportunity of selection and citation. One passage, however, deserves a record. After referring to the many great men who had borne their parts in the discussion of the question, he says :—

“Walking before the sacred images of the illustrious dead, as in a public and solemn procession, shall we not dismiss all party feeling, all angry passions and unworthy prejudices? I will not talk of past disputes, I will not mingle in this act of national justice any thing that can awaken personal animosity.”

It was on the 28th of February, 1821, that Mr. Plunket brought forward his motion regarding Catholic Emancipation ; and it soon became evident, says Mr. Alison², “that if the mantle of Romilly had descended on Mackintosh, that of Grattan had fallen on the shoulders of Plunket.” This was the first occasion on which a majority was obtained for Catholic Emancipation. This majority was increased on the third reading to nineteen.

Shortly afterwards a modification of the Ministry took place, and the government of Lord Liverpool was joined by a portion of the Grenville party. The most important result of this coalition was manifested in Ireland ; and some friends of the Catholics were admitted into power. Marquis Wellesley was made Lord Lieutenant in room of Lord Talbot ; Mr. Saurin, the champion of the Irish party, gave way to

¹ It is fair to Lord Castlereagh's memory to say, that in his papers a letter is printed from Lord Plunket to the present Marquis of Londonderry, in which he says that he was mainly induced to accept office under Lord Liverpool's government from his knowledge and appreciation of Lord Castlereagh's qualities.

² History of Europe, vol. ii. p. 472.

Mr. Plunket; and Mr. Bushe, also a Catholic supporter, was made Solicitor-General; while, on the principle of preserving a balance of parties, Mr. Goulburn, a pro-Protestant, was made Secretary to the Government.

After some further modification of the Government, Mr. Plunket continuing in office, the time arrived when Mr. Attorney-General considered he had a right to the Bench. Mr. Canning proposed to make him Master of the Rolls in England; but this proving unpalatable to the English Bar, he was appointed Chief Justice of the Common Pleas in Ireland, and raised to the peerage of the United Kingdom by the title of Baron Plunket.

In 1830, when the Duke of Wellington brought forward the Catholic Relief Bill, no one in the House of Lords lent him such powerful and useful help¹; and with this measure his labours as a legislator may be said to have ceased.

When the Whigs came in, in 1834, he was appointed Lord Chancellor for Ireland; and he held the Irish Seals, with the interim of a few months, until 1841, when he reluctantly resigned them to Lord Campbell.

Since his retirement from office he has taken scarcely any part in public affairs. He died on January 5. 1854, at the advanced age of eighty-nine; and is succeeded by his eldest son, the Bishop of Down.

For some further illustration of his eloquence and characteristics, we must again have recourse to the interesting sketches of Mr. Phillips.

His speech when, as Attorney-General, he prosecuted the rioters in the celebrated "bottle case," during the Viceroyalty of the Marquis of Wellesley, on the 3d of February, 1823, is thus alluded to:—

"The nature of the orator's mind precludes the idea that what

¹ The Duke thus noticed his speech, in connexion with that of Lord Lyndhurst, then Chancellor, as being the two great speeches on the question. He thus addressed Lord Eldon:—"I had hoped that noble and learned earl who has been the great opponent of this measure, would have come down this evening with some legal arguments in answer to those which have been so ably urged by my noble and learned friend on the woolsack, and by my noble and learned friend who sits opposite (Lord Plunket)."—Duke of Wellington, April 10. 1829. Speeches edited by Hazlitt, vol. i. p. 294.

might at first sight seem a digression was one in reality. He never did any thing merely for display. The allusion to William III. was forced upon him by the nature of the trial, and nothing can be more admirable than the skill displayed in it, when it is remembered that it was a paramount object to conciliate the Orange jury he was addressing. Considered merely as an historic sketch, it seems to me, for depth of thought, condensed and nervous expression, masterly results, and a noble and inspiring eloquence, worthy of the highest place in English literature:—

“ ‘Perhaps,’ said he, ‘my Lords, there is not to be found in the annals of history a character more truly great than that of William III. Perhaps no person has ever appeared on the theatre of the world who has conferred more essential or more lasting benefits on mankind—on these countries certainly none. When I look at the abstract merits of his character, I contemplate him with admiration and reverence. Lord of a petty principality, destitute of all resources but those which nature had endowed him with, regarded with jealousy and envy by those whose battles he fought, thwarted in all his councils, embarrassed in all his movements, deserted in his most critical enterprises, he continued to mould all these discordant materials, to govern all these warring interests, and merely, by the force of his genius, the ascendancy of his integrity, and the immovable firmness and constancy of his nature, to combine them into an indissoluble alliance against the schemes of despotism and universal domination of the most powerful monarch in Europe, seconded by the ablest generals, at the head of the bravest and best disciplined armies in the world, and wielding, without check or control, the unlimited resources of his empire. He was not a consummate general; military men will point out his errors; in that respect fortune did not favour him, save by throwing *the lustre of adversity over all his virtues*. He sustained defeat after defeat, but always rose *adversâ rerum immersabilis undâ*! Looking merely at his shining qualities and achievements I admire him, as I do a Scipio, a Regulus, a Fabius. A model of tranquil courage, undeviating probity, and armed with a resoluteness and a constancy in the cause of truth and freedom, which rendered him superior to the accidents that control the fate of ordinary men.

“ ‘But this is not all. I feel that to him, under God, I am at this moment indebted for the enjoyment of the rights which I possess, as a subject of these free countries; to him I owe the blessings of civil and religious liberty, and I venerate his memory with a fervour of devotion suited to his illustrious qualities and to his godlike acts.’

“ On the Bench Lord P. was remarked for the care and diligence with which he performed his high judicial duties. Nothing could exceed the attention which he bestowed on every case, having little regard to their relative importance, justly considering that nothing could come before a judge without calling for all the care he could bestow on it. Though not claiming to rank with the

Eldons or Mansfields, either at Common Law or in Equity, still he had a completely legal understanding ; and his judgments abundantly attest this, whether dealing with the law or the facts. Several of his decrees in the Court of Chancery had been reversed by his successor, Sir Edward Sugden, one of the greatest Equity lawyers that Westminster Hall ever produced ; but the reversals were afterwards in some cases set aside by the House of Lords.

"In one of these his judgment was sustained against that of this great jurisconsult on a point of property law,—a department which the latter had almost made his own. When in Parliament Mr. Plunket filled such a space as a senator in the public eye that justice has scarcely been done to his merits as an advocate in the Courts of Law. Yet he was a great and a successful one.¹ The marvellous power which is said, in 1821, to have converted nine hostile votes on the Roman Catholic question in the British House of Commons, lost none of its efficacy in an Irish Court of Law. The grave senator, discussing in Parliament the interests of nations with a statesman's wisdom, will hardly be recognised in the dexterous tactician of a country assize. Yet such was his versatility, and so much was he at home in each variety of his efforts, that it was difficult to say which deserved the preference. When we behold the minister quailing beneath his rebuke,—the bigot abashed by his exposure, or silenced by his reasoning,—the slave freed, and the Constitution's outlaw recalled and recognised at the mandate of a tongue which taught all who heard it that 'Attic voices' were no longer mute,—imagination itself can scarcely picture him the hero of a Country Court, awakening the wonder of its peasant audience. Yet Circuit anecdotes enough attest his talent and its exercise. It is recorded that, in his own county town of Enniskillen, he defended a horse-stealer with such consummate tact, that one of the fraternity, in a paroxysm of delight, burst into an exclamation, 'Long life to you, Plunket! *The first horse I steal, boys, I'll have Plunket.*'"

The Court of Chancery latterly monopolising his attention, all opportunity for display was lost. Yet here, so eminently useful was he, that he could afford to play with his business, deserting it for Parliament, and certain of finding it awaiting his return.

"The witticisms of Mr. Plunket had a causticity about them which with many added to their relish: they were always ready, and most of them manifestly struck off at the moment. The following is a fair specimen of his promptness and his sarcasm:—on the formation of the Grenville administration Bushe, who had the reputation of a waverer, apologised one day for his absence from Court, on the ground that he was 'cabinet-making.'"

¹ St. George Daly, his old antagonist, confessed as a Judge that until he had heard Plunket's argument on the King v. O'Grady, "he had never known what argument was."

The Chancellor maliciously disclosed the excuse on his return: — “Oh! indeed, my Lord! that is an occupation in which my friend would distance me, as I never was either a *turner* or a *joiner*.” Of a similar character was his remark on being told that his successor in the Court of Common Pleas had little or nothing to do. “Well, well,” said he, “they’re *equal to it*.” A very amusing *bon mot* of his, in itself precludes the possibility of preparation: — There was a clerk in the Court of Chancery of the name of Moore, who plumed himself on his superior penmanship, and an attorney of the name of Morris, an exquisite in his dress, which generally had the finish of a bunch of geraniums in his button-hole.

“Plunket,” said Bushe one day while they were waiting or the Chancellor, “Why should this court remind us of the road to Chester?” “I give it up,” replied Plunket. “Don’t you see,” said Bushe, “we are under *Penman Moore*.” “Well, Bushe,” rejoined Plunket, “I was stupid, indeed, with *Beau Morris* opposite me.” Being told of the appointment of a person, who had the reputation of indolence, to a judicial office, when there was little business, “It’s the very court for him!” he exclaimed: “it will be up every day before himself.”

He could jest sometimes even at his own expense. Every body knew how acutely he felt his forced resignation of the Chancellorship, and his supersedure by Lord Campbell. A violent tempest arose on the day of his expected arrival; and a friend remarking to him, how sick of his promotion the passage must have made him, “Yes,” said Plunket, ruefully, “but it won’t make him throw up the seals.”

Lord Plunket was married as early in life as 1791, to Catherine, only daughter of Mr. John M’Causland, who represented the county of Donegal in four parliaments, by whom he had a numerous family.

Lord Holland, in his *Memoirs of the Whig party* (vol. ii.), just published, speaks thus of Lord Plunket: — “Mr. Plunket, too, the greatest accession to parliamentary debates that many years had produced, exerted a species of com-

manding eloquence and close reasoning in favour of concessions to Roman Catholics which the House, already enriched with genius and talent from Ireland, had never yet witnessed from that country."

Lord Plunket owed his rise in our profession, it should ever be kept in the mind of the student, not so much to that extraordinary eloquence for which he was renowned, as to the singular business-like tenor of his mind, and, consequently, of his speaking. A devotion to the subject in hand, an utter—almost an indignant—contempt for all finery, all superfluous ornament, with his powers of clear statement and of close argumentation, made him a most eminent advocate as well as debater, even if he had never displayed other qualities of an orator. The reader will find a just description of him in a former Number of this Review (vol. vi. No. 12.), and we may here insert the testimony borne to his high merits by an English observer, as showing that there is no national prejudice to warp our judgment. After dwelling, in the text of his account of Chief Justice Bushe, on Plunket's "condensed and vigorous demonstration, and those marvellous figures, sparingly introduced, but, whensoever used, of an application to the argument absolutely magical," Lord Brougham adds this note¹:—"Let no one party suppose that this is an exaggerated description of Lord Plunket's extraordinary eloquence. Where shall be found such figures as those which follow,—each raising a living image before the mind, yet each embodying not merely a principle, but the very argument in hand,—each leaving that very argument literally translated into figure? The first relates to the Statutes of Limitation, or to Prescriptive Title. 'If Time destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the lawgiver has placed an hour-glass, by which he metes out incessantly those portions of duration that render needless the evidence he has swept away.' Explaining why he had now

¹ *Statesmen of George the Third's Time*, vol. iii.

(1831) become a Reformer, when he had before opposed the question, — ‘Circumstances,’ said he, ‘are wholly changed. Once Reform came to our door like a felon, a robber to be resisted. He now approaches like a creditor; you admit the justice of his demand, and only dispute at what time and by what instalments he shall be paid.’ ”

It requires only to mark the date of this last speech, in order to be convinced of their ignorance or thoughtlessness, who have of late affirmed that his eloquence did not survive his removal from the House of Commons, and that for above a quarter of a century his voice had never been heard but on the Bench.

But it is impossible to dwell on the recollections of this eminent person, and not mark another injustice of a more grave cast than has been done him, but not him alone. Assuredly, next to Grattan, he was the champion to whom the Roman Catholics most owed their final victory. His speeches in 1807, 1812, and 1821, were, beyond all comparison, the finest and the most effective that were ever delivered on the question; their fame as orations in every critical view is established, and they stand among the very first of our age; but their power in furthering the cause at the time is known to every one who recollects those times; they, the earlier ones especially, gave a new turn to the question, placed it on a vantage ground it never before had occupied. And yet the intrigues of factions, combining with the increasing, the ignorant clamours of the multitude, have succeeded in making the Catholic body wholly forget to whom they owe their success,—the Grattans and Plunkets, as well as the Foxes and Grenvilles, transferring all their gratitude to the agitators,—guides as well as votaries of the mob.

It was impossible to pass over the decease of this great man without some immediate notice; but our principal motive for not delaying until we had the means of doing more justice to the subject, remains to be mentioned. The speeches have never been given to the world in an authentic form. It is certain that some, as that of 1821, have been with considerable acumen reported in the Parliamentary Debates. But we have reason to know (at least, it has been confidently

stated in Dublin, and, we believe, with his own authority), that he had made, some years ago, progress in correcting the reports of those and others: and it was the opinion of the profession then that he intended to sanction a publication of the whole. That some, and particularly those at the Bar, have been most imperfectly preserved, we can bear testimony from local knowledge. Surely it behoves his surviving relatives and friends to take care that this want is without delay supplied from whatever materials he may have left, and with the help of the few contemporaries who have survived him.

We will add that this feeling is, in our belief, very far from being confined to Ireland, though, of course, it prevails most there.¹

ART. II. — THE PRINCE CONSORT.

The Prince Albert. Ridgway: 1854.

THE "Law Review" has nothing to do with Princes or Courts, except Courts of Law; but with Constitutional questions it has a great deal to do; and, therefore, we must refer our readers to a pamphlet which has just appeared on the alleged interference of the Prince with public affairs. The lawyer who discusses this subject — for such the writer plainly is, and by no manner of means a courtier — does not enter into the question of fact, except that he appears to doubt, or rather to disbelieve, all the rumours that have got abroad. But he demurs, as it were; he says, "Suppose it were so, the illegal or unconstitutional nature of the interference is denied;" and he fully shows how ill-informed those are who have denounced it as against either the Law or the Constitution for the Royal Consort to advise the Sovereign, as any one else may, subject to all the grave responsibilities of such a proceeding.

The manner in which the question has been treated in the country is remarkable. The argument, if such it can be called, is, that the Prince is an irresponsible person, and,

¹ A Memoir of Lord Plunket, by Mr. Edward Berwick, President of Queen's College, Galway, and the grand nephew of Grattan, is already announced.

therefore, ought to keep aloof from all state affairs. He is as entirely a responsible person as any one man in the country. Some persons have not scrupled even to quote the Act of Settlement as prohibiting a foreigner from being a Privy Councillor though naturalised. The case is simply this. The Act of Settlement, 12 & 13 Wm. III. c. 2., which forbids aliens, though naturalised, to hold office, must have been wholly inoperative on any alien naturalised by Act of Parliament, inasmuch as the Legislature could not be bound by any Act. Therefore the 1 Geo. I. s. 2. c. 4. provided that no naturalisation bill should be presented without a clause disabling the person naturalised from being a Privy Councillor; and, of course, this prevented—at least it was always understood to prevent—any such bill from being presented. Probably it could not have prevented Parliament from passing an act without going through the forms required by standing orders. However, that need not be considered; the prohibition was understood to be conclusive; and, therefore, when any Naturalisation Act was to be passed without the disqualifying clause, an act was first passed to suspend the operation of the act 1 Geo. I., so that a bill was presented without that clause. This happened when the Prince was naturalised, and this act makes him to all intents and purposes as if he had been a natural born subject. In 1844, the provision of stat. 1 Geo. I. c. 4. was repealed by stat. 7 & 8 Vict. 66., and since that time persons have been naturalised, and now sit in Parliament, although born abroad, and not born of English parents. The Prince stands precisely in the same predicament, the special act preliminary to his naturalisation bill having had the effect in his case which the repealing act of 1844 had in all cases. Indeed, the statute of Wm. III. prohibits aliens from holding lands; and, according to the absurd contention of those who argue that it overrides the special Naturalisation Act, no person naturalised by Act of Parliament, if born of foreign parents, could hold land. The Repealing Act 7 & 8 Vict. c. 66. has taken the farther precaution, as if such a wild argument had been foreseen, of declaring all the provisions of the former acts, including the act of Wm. III. and of 1 Geo. I. by

name, repealed in so far as they are inconsistent with the provisions of this act (7 & 8 Vict. c. 66.).

The Prince was thus naturalised, and enabled to be a Privy Councillor. He has been a member of that body ever since his residence in this country, and has constantly attended the Councils at which the Queen presided.

That as a Privy Councillor he is capable of being consulted according to the strictest forms of the Constitution; that he is, under the obligation of his oath, responsible for the advice he gives—for the information he communicates—for the knowledge he receives—for the use he makes of it—in short, as responsible as any of the official advisers of the Crown in every respect whatsoever, is shown by the statements of the Pamphlet to which we have referred. But we have deemed it right to make mention of the strange blunders respecting the Act of Settlement preventing his Royal Highness from being a Privy Councillor, because this gross absurdity had apparently not fallen under the author's observation.¹ At least, he makes no reference to it.

The cases of members of the Royal Family holding high office, as Prince George of Denmark, husband of Queen Anne, Duke of Clarence, afterwards Wm. IV., Duke of York, are discussed in this tract. But we can do no more than refer to it; and from the matter, other than legal and constitutional, connected with the subject we gladly abstain. Party, we fear, has much to do with the discussion; and some may favour the rumour in private who will abstain from it in public. With regard to the Prince himself, we had really supposed that his extremely discreet conduct on every occasion would have disarmed all hostility, even if his exertions, his most useful exertions in behalf of measures of public improvement, failed to obtain universally the favour they have found very generally.

¹ Within the last few days we have seen this point as to the Act of Settlement urged in a letter to one of the newspapers, signed by a barrister who gives his name.

ART. III.—LAW OF ARBITRATION.

A Letter to the Right Hon. Lord Brougham and Vaux on the Improvement and Consolidation of the Law of Arbitration.

By FRANCIS RUSSELL, Esq., M. A., Barrister. 1853.

WE gave, in our last Number, Lord Brougham's Letter to Lord Denman, in which two important subjects, among others, are broached. One is, the Commissions issued by the Government, more especially that on County Courts, which he had long earnestly called for, and which the Lord Chancellor deserves the greatest praise for agreeing to upon further consideration, he having originally disapproved of it; but he candidly stated that his objections had been entirely removed. The other subject, not unconnected with that, was, the glaring defects in the Law of Arbitration, to remedy which Lord Brougham brought in a Bill at the close of the last Session, and he expressed in the letter above referred to, how greatly he had been indebted, in preparing it, to the assistance of Mr. F. Russell, author of the well-known work on the Law of Arbitrament. That gentleman has since, in consequence, published a very valuable pamphlet, in the form of a letter addressed to him, and he has not only commented upon the provisions of the Bill, but upon other improvements of the Law, including that most important one which Lord Brougham announced in his letter, that he proposed adding to the measure, — the vesting a discretion in the Judges, subject to due checks, of requiring parties to refer in certain cases.

It is not our intention here to give any detailed account of Mr. Russell's work, because we must assume that our readers are sufficiently acquainted with it. To such as have not read it, we strongly recommend a perusal, as they will find the whole subject treated in a full and distinct manner, with that knowledge of all its branches, which might be expected in the able and learned author, and with an exemplary moderation and circumspection in discussing all the proposed amendments of the Law. But it is necessary that we should offer a few remarks upon the subject generally,

and upon the call which there is for applying a remedy to the evils loudly complained of.

The grievances under which the community, but especially the mercantile classes, suffer from the present state of the Law touching Arbitration are very much understated both in Lord Brougham's letter and in Mr. Russell's. The clause so constantly introduced into partnership deeds, charter parties, and almost all other instruments, providing for a reference in case of disputes arising, is always relied upon as a great security against the evils of litigation until the differences occur, and its use arises, when it is found to be absolutely nugatory, because it binds neither party, and in the very great majority of cases, they cannot agree, exactly from the circumstance of the difference having occurred, and the consequent quarrel. How solemnly soever they may have bound themselves to refer, nay, to abide by the award of persons named, no action lies against any party for his breach of the contract, no proceeding in Equity, competent to compel a performance. Thus, take the case of a partnership, the whole affairs must be thrown into Chancery, instead of a speedy and cheap examination of conflicting claims by an arbitrator. We speak with the precise and specific knowledge of the fact, when we state that the most injurious, not seldom the most ruinous consequences, befall mercantile men from this glaring defect, well meriting the name of gross absurdity in our Law.

The Arbitration Bill was, in fact, originally suggested by mercantile men of eminence; and, we may add, that even the important addition intended to be made, was strongly recommended in a statement which a daily paper ("The Times") last autumn inserted, proceeding apparently from the City of London. We venture to think that the portion of the community we are citing belong not in the least degree to the class of theoretical or enthusiastic supporters of Reform in any branch of our system, and that when they are anxious for a change in the Law, it is because they have had certain and not short experience of its hurtful operation.

To illustrate this point, we may make mention of two propositions that have been brought before the public,—the establishment of commercial tribunals, sometimes called Cham-

bers of Commerce, which has found favour with many persons both in London, in Liverpool, and other trading towns, being an adoption of the plan pursued in many foreign countries, and the importation of another arrangement also found to produce happy effects abroad,—the process of Reconcilement. Now, both these plans are admitted, on all hands, to be productive of great benefit, but they are attended with great difficulty. The entrusting to unlearned men the decision of cases involving all the points of Mercantile Law that can arise, is seriously objected to. The tendency of Reconcilement processes to become a mere form, unless some compulsory power is lodged in the Judge, is strongly insisted upon. But if the Law of Arbitration is put upon a sound and consistent footing, it seems clear that every benefit which could result from Tribunals of Commerce would be secured without any of these disadvantages, and a large portion, at least, of the good resulting from Courts of Reconcilement would be obtained. There would indeed remain the step of requiring parties to appear before the Judge without the presence of professional men, so that no sinister interest might interfere with their following the advice which they should receive. But, when it is well known by parties that there are official arbitrators well qualified to decide their differences, and to decide at a trifling cost, we may expect that such recourse will be had without regarding the advice of those whose interest is in favour of litigation, and adverse to a settlement.

Mr. Russell, in his pamphlet, suggests the propriety of either increasing the number of County Court Judges, or of appointing a certain small number to act merely as arbitrators. Lord Brougham also relies mainly upon the County Court Judges; and the Report of the Common Law Commissioners gives the Judge at Nisi Prius the power of referring cases turning chiefly upon account to these Judges. We venture to think that there is another arrangement which deserves favourable consideration. The Report of the Commission on the Bankruptcy Courts has not yet been made; and we have no means of knowing what recommendations it is likely to contain. But we cannot doubt that one fact will be fully ascertained, namely, the inconsiderable amount of

the work done by those Courts. The London Commissioners only sit three days in a week, and have two or three months of continued recess. In the Country the average of course varies; but some of the Commissioners do not sit nearly so much as those in London. It is manifest, therefore, that it would be possible to transfer in some places a portion of the Bankruptcy business to the County Court Judge, where he was underworked, and to give the Bankruptcy Commissioner the duties of an official arbitrator. The experience in the business of Bankruptcy is evidently of a kind to make the Commissioner better able to deal with matters of account, and generally with mercantile questions. But it is essential to all such arrangements, that a choice of their Court should be left to the parties, and that the Judge, whether at Nisi Prius or in chambers, should only name the Court in case the parties cannot agree. Mr. Commissioner Hill's able letter on this subject, which our last Number contained, well deserves to be consulted. There is one part of it, however, in which we cannot concur; he would maintain the present rule of allowing parties to choose in which of the Superior Courts their actions shall be tried. This gives rise to the most inconvenient inequality in the distribution of business, one Court being overwhelmed, while another has little to do. In Ireland this inconvenience was felt, and for many years the whole suits-at-law have been equally distributed among the three Courts. In Chancery the same course is pursued with us. The reasons which are irresistible in favour of giving an option among the local Courts do not exist at all with regard to those of Westminster.

It is most earnestly to be desired that the Arbitration Bill may pass without more delay than is required for the fullest consideration of its provisions. Some of them no one has affected to regard as at all doubtful. Thus, the jealousy which is shown by the Courts both of Law and Equity, that their jurisdiction should be interfered with, and which has given rise to a kind of maxim that men should not be allowed to renounce the right of applying to those Courts, is triumphantly exposed by Mr. Russell. "Surely," says he, "a man may be allowed to renounce, for his own benefit, a right

introduced for his benefit; and he is suffered every day to renounce, not only the right of having his cause tried by the Superior Courts, but of having it tried at all, by executing a warrant of attorney to confess judgment for any sum." This principle, if it can so be termed, has of late been encroached upon so far, that what remains of the evil occasioned by it, though far the greater portion of its mischief, can now be removed without any material addition to the encroachment. Till lately submissions were revocable. Up to the last moment a party might, in the face of his agreement, stop the whole proceeding before an arbitrator. In 1833 this most absurd law was repealed; and now, unless upon cause shown to the satisfaction of the Court, the reference must proceed. The Arbitration Bill proposes that, subject to the same discretion, parties should be compelled to refer who have bound themselves so to do, by the party with whom the consent or agreement has been made being allowed to plead it in bar of any action or suit brought against him.

Then the principle of compulsory reference has been sanctioned by the Report of the Commissioners. They propose to arm the Judge at *Nisi Prius* with authority to refer such actions as cannot be, with any chance of a satisfactory conclusion, tried by a Jury. That some such remedy is necessary for one of the greatest practical evils in our procedure, cannot be denied. But there are two considerations of great weight which arise in the recommendation of the Commissioners. In the first place, it is suggested, that some check must be provided to prevent the Judge, under the pressure of perhaps a heavy cause-list from getting rid unduly of a trial likely to be tedious; and, secondly, it must be remembered that one of the great mischiefs occasioned by indiscriminate jury trial is, that the expense has been incurred before the reference, and will be incurred over again when the Judge refers. The course which the Arbitration Bill proposes is directed to meet both these objections. Either party may summon the other to show cause before a Judge at chambers why the case should not be referred, either to a County Court Judge, or some arbitrator chosen by both parties, or by the Judge, if they can-

not agree. If the reference suggested by the Judge is refused, then the cause must go to trial in the usual way: but the costs, whatever be the event, are to fall upon the party refusing, unless the Judge who tries the cause shall certify, and in that case they will abide the event as they now do. The mercantile men in the City, to whom we alluded in the former part of these remarks, have expressed great dissatisfaction with all plans which postpone the exercise of the Judge's discretion as to referring a cause incapable of being tried by a jury, until the expense of bringing it to trial has been incurred. The Commissioners have, no doubt, also reported in favour of dispensing with jury trial altogether in certain cases: but this is only to be when both parties agree to prefer the decision of the Judge; and it is needless to observe, how often one or other will hold out against dispensing with the Jury, exactly in the same way as he will refuse a reference, and for the same reasons — his adversary wishes it, — that is reason sufficient with some to refuse it. His attorney is averse to it, — that prevents others. The option should by all means be given: and the experience of the County Courts, where hardly any causes are tried by Jury of those in which the option is given, clearly proves the expediency of extending to it all causes in all Courts. But for the particular evil complained of, it certainly will afford only a partial and inadequate remedy.

Mr. Russell has offered a number of very useful suggestions on other parts of the Law of Arbitration, besides those to which we have referred. We trust that they will meet with due attention, and be either adopted in the present Bill, or made the subject of another, which he strongly recommends, for consolidating as well as amending the whole of this very important branch of the Law.

ART. IV. — COUNTY COURTS.

To the Editor of the Law Review.

DEAR SIR,

A YEAR has elapsed¹ since I ventured, through the medium of your pages, to point out the extraordinary system pursued by the movers of official legislation to frustrate the great, and hitherto eminently successful, experiment of Local Courts, by heaping premiums and bounties on the Superior Courts.

The year 1853 has seen two startling examples of the extension of this system:—

1. Lord Brougham having introduced into Mr. Fitzroy's County Courts Extension Act a clause enabling the parties, by mutual consent, to try in the County Courts causes not within their jurisdiction, the Judges of the Superior Courts appointed to fix on a scale of costs have refused to allow to attorneys in such cases the same remuneration that they would be entitled to in the Superior Courts. Thus the clause alluded to has practically been rendered all but a dead letter.

2. But the most remarkable example of new "Bounties" in favour of the Superior Courts is the Act carried by Lord St. Leonard's at the end of last Session, placing at the disposal of the Chancellor *for the time being*—(to be employed in supporting the officials, and in other expenses connected with the Court of Chancery,)—the property of those unfortunate suitors who have died without heirs, leaving their property in the custody of that Court. The professed object of this Act was to make the Court of Chancery a "cheap Court!" In other words, its aim is to reduce the fees payable by the Chancery suitors at the expense of property to which that Court and its officers have no manner of right, and which in reality belongs to the nation at large, as all unclaimed property does by the law of this country.

Both these examples have occurred since my Letter on the subject of "Government Bounties in favour of the Superior

¹ See 17 L. R. 265.

Courts" was published in your Review, and they afford conspicuous additional evidence of the truth of the statements I have ventured to place before the public in that Letter, and in subsequent publications.

Happily for the cause of justice and fair play, the candid spirit of the Lord Chancellor (Lord Cranworth) conceded during the last Session to Lord Brougham's eloquent and reiterated remonstrances a Commission to inquire into the County Courts, which is now sitting, and which will, no doubt, give full and fair inquiry to the foregoing, and to all other topics connected with these Courts.

On some of these topics, and with the view of humbly assisting the investigations of the learned Commissioners, I now beg to place before you a few cursory observations.

The fees in the County Courts are too high: they should be lowered or abolished. At the same time, it is certain that the clerks and bailiffs (the local officers), even with these high fees, are not adequately paid. It is obvious, therefore, that as one means of obtaining resources retrenchment should be practised in the Superior Courts. In the Courts of Common Law an end should be put to the wretched system that commonly prevails of wasting the time of four or five judges in listening to arguments on questions that one or two judges would be competent to decide.

Funds like the Deceased Suitors' Fund in Chancery (if not fused with the general mass of public revenues) should be applied impartially to cheapen the administration of justice generally in all public tribunals, the County Courts included. In truth it might be reasonably suggested, that if the Government or Legislature undertakes to dispose of the property of the victims of Chancery abuses, it might be expected that the probable wishes of those unfortunate men in favour of really cheap and accessible tribunals might have secured such a destination of their assets, rather than to the support of the very jurisdiction of which they were martyrs.

Facilities should be given to enable suitors in all cases to bring their actions in the County Courts without restriction as regards magnitude or amount, combined with

facilities of removal, and appeal in actions, exceeding in amount the present limits of the County Courts' jurisdiction.

A plaintiff and defendant may refer a cause to the most ignorant man in their neighbourhood, and the attorney of each would obtain proper professional remuneration. But the County Courts are not used as tribunals of arbitration, owing to the refusal above noticed of the Judges of the Superior Courts (selected to consider the subject) to decide on a scale of professional costs.

There is one part of the costs of the County Courts (and of all other tribunals) which is especially objectionable. I mean the expenses which the suitors have to pay, owing to the doubts and imperfections of the law itself—in other words, for the errors of the makers or of the administrators of the law. It is quite enough in a country boasting of its freedom, and of the impartiality of its courts of justice, that men should pay dearly for their own faults, or for their own mistakes, in commencing or defending actions destitute of solid grounds. But it is absurd (and it would be ridiculous were not the consequences of a grave and grievous character) that suitors should pay for the rudeness and clumsiness of the laws themselves; that they should have to pay out of their pockets, and out of those resources on which the support of their families depend, the cost of settling disputed rules of law, which, if left doubtful by the Legislature, should be cleared up and expounded by our Courts at the expense, not of individuals, but of the nation at large, is obviously unjust. I may mention a flagrant example drawn from my own experience, and I can scarcely conceive that the human imagination could devise a more cogent one.

When I had the honour of receiving my appointment of Judge of the County Courts from the hands of Lord Cottenham, I was induced to select as the county clerk of one of the counties in my circuit, an individual who (though he was represented to me to be a person eminently fitted for an office of pecuniary trust) proved, in less than a year, insolvent in his affairs, and under circumstances that rendered it, in my judgment, utterly improper that he should

continue to retain an office involving the receipt and payment of the moneys, or the custody and superintendence of the records of a court of justice. This person appealed under these circumstances to my judgment, and asked me whether I could retain him consistently with my sense of public duty. After a careful investigation, and finding that there was no reasonable probability that he would satisfy his creditors, or that he could comply with my own views, I returned a reply in the negative, and stated my desire that he would resign his appointment. With this requisition, though he had himself (as I have already stated) left it to my judgment whether he was to be continued or not, he refused to comply; consequently I dismissed him from his office, and submitted that dismissal (as I was bound to do under the first County Courts Act) to the approval of the Lord Chancellor (Lord Cottenham), who, after giving to the subject that patient and conscientious consideration which he uniformly bestowed on all matters that fell within the sphere of his duties, confirmed the dismissal on the broad ground that insolvent circumstances are a disqualification for an office of pecuniary and personal trust. At the same time, and on the same grounds, his lordship confirmed my appointment of the county clerk whom I had selected as his successor. I believe it would be scarcely credited, were not the facts perfectly notorious, that some months afterwards the person thus dismissed succeeded, by an application to the Court of Queen's Bench, in setting aside this dismissal, and in obtaining an opinion in his favour from the learned judges of that court—an opinion based not on a technical interpretation of words, but on the unqualified doctrine (adopted by them) that pecuniary difficulties form no objection to the retention of a person as county clerk, though it was fully explained, and earnestly pointed out in the arguments of counsel, that all the moneys paid or received through the County Court pass through the hands of the clerk. This is the first time that the Court of Queen's Bench ever assumed, as I believe, to interfere with the decisions in point of law of any authority having an appellate or visitatorial power; and it is the first, and probably the

last time, that its interference will be recorded to have been exercised where that appellate power was vested in the judge of a superior court—the Lord High Chancellor—the head of the profession of the law in this country. Almost as soon as this decision (which, as it stood, would have made the County Courts a public nuisance) was pronounced, it was reversed by legislative enactments giving more extensive powers of dismissing county clerks to the Lord Chancellor.

It is not my intention to reflect on the learned judges who delivered this judgment, Lord Campbell and Mr. Justice Erle, both men of high judicial talents, and of liberal and impartial minds. For the purpose of this letter, it is immaterial which of the two great courts of this country, the Court of Queen's Bench or the Court of Chancery, was in error. What I wish to direct attention to is, the gross injustice inflicted by these conflicting decisions. The county clerk whom I appointed as successor to the dismissed clerk had to bear the heavy expenses of unsuccessfully resisting the *quo warranto* which called in question, and ultimately stripped him of, an appointment which he had received with the full sanction of the constituted authorities of the country. Is it possible to conceive a more flagrant practical injustice?

I know that we may read in Blackstone, and other excellent productions, that "every man is supposed to know the law." But this supposition is sometimes a practical absurdity. Can any man be expected to foresee decisions on points on which the highest courts in the country are at variance?

A subject to which the foregoing remarks have an urgent practical application, is that of appeals from the County Courts. It is commonly said that the expense of appeals is light. But I think, if the costs on both sides (which fall on the losing party) be taken into account, those costs will be found to be by no means light. Now, in my judgment, the costs of appeals should, in some cases, be borne by the Government, in order to prevent the oppression to which they may otherwise give rise. The expenses of clearing up the doubts and absurdities of the law (as I have observed)

should be paid by the public, and not by individuals. For example, if the plaintiff were defeated in the County Court, and succeeded on Appeal, I would simply throw on the defendant the costs he would have had to pay had he been defeated in the County Court. I would not throw upon him any of the costs (professional, or of any other kind) of the Court above. The number of Appeals is at present trifling, and those costs (of Appeals) would not amount to much; and if the proposition I have suggested were adopted, the number of Appeals would be still further diminished; for of the few now lodged, some are probably instigated by the disposition to oppress and intimidate. Where the appellant is unsuccessful, I would compel him to pay some part of the costs of the Appeal—a subject on which some discretion should be given to the Court of Appeal. The views on Appeals I have expressed in this letter (though they may be rather adverse to ordinary professional prepossessions) will, I venture to anticipate, receive eventually the assent of experienced and reflecting minds. The distinction that is commonly made between Court Fees and Professional Charges is I conceive in many points of view illusory. Costs of any kind, thrown on the suitor, equally tend to make justice dear, and to create facilities of oppression, whether those costs consist of Court Fees or of the Attorneys' Fees (that may be imposed on the parties in cases of appeals, or on other occasions): for this reason, I think it of the highest importance that appeals of all kinds should not be attended with heavy costs to the losing party. There are, also, other reasons why I think it very desirable that appeals should be inexpensive, viz. in order that they may be readily available for their professed object,—that of maintaining uniformity in the laws of the country. Were appropriate means used to render the Appellate Courts of the county cheap and accessible, the advantage of making the County Courts tribunals of universal primary jurisdiction, would become especially manifest.

An important subject, that eminently deserves consideration, is the institution of Trial by Jury, as applied to the system of County Courts.

The jury trials in my circuit have formed a small fraction of the entire number of causes tried. I feel persuaded that in at least two-thirds of the cases in which juries have been applied for, the applicant has been influenced by the hope of obtaining some undue advantage at the hands of the jury which he could not expect from the Judge. This advantage would be derivable from some influence of a local sectarian or party character, or from the power of intimidation which, in a small community, his attorney might be supposed to possess over many of the class of shopkeepers from which the jury might be selected.

On this subject demonstration is impossible. But my conviction is, nevertheless, perfectly clear and unhesitating; which will, I presume, suffice for the purposes of your inquiry.

There are, doubtless, a few cases in which juries are applied for under the influence of motives by no means reprehensible or corrupt. For example, occasionally there are cases involving the arcana of particular trades or of farming, in which juries of the initiated classes are applied for. There are, also, cases in which a suitor having a honest case knows, nevertheless, that he will be met by hard swearing on the part of opponents of unscrupulous character, and is induced to call for a jury to whom their character is known, lest the Judge, from want of that knowledge, should be misled by hardy but plausible falsehoods.

Very few jury trials, however, originate in applications prompted by motives such as I have last alluded to. Local prejudices and passions will sometimes drive juries (who can hardly be set down as dishonest or ill-intentioned) into rank absurdities that would be deemed incredible, were not the fact of their occurrence certain. Possibly the most flagrant example has been in a district of my circuit, in which five juries in succession gave verdicts with damages to a plaintiff in an action for false imprisonment, in open defiance of the opinion of the Court, that there was no case to go to the jury. The plaintiff had been taken up and detained a few hours on a charge of riot. The truth of the charge, and the consequent groundlessness of his action, was proved Court

after Court by his own witnesses, from whose evidence it appeared that he had gone with a mob to take away by force the hay from a field in the possession of another man, and which he claimed to be his own property; that a scuffle ensued; that the police and magistrates were in attendance, and the Riot Act read. I have no doubt, that had I possessed the power of changing the venue to the court town of the next district, which is only eighteen miles off, or to any Court out of the reach of the local excitement, such absurd decisions on the part of juries would have been impossible, and a different verdict would have been returned.

I think a power to change the venue given to the Judge of the County Courts would operate very largely in the most beneficial of all ways, viz., in that of prevention. Dishonest suitors would cease, for the most part, to apply for juries when they found that the Judge has the power to remove the cause out of the sphere of local and improper influences, where such can be shown to exist.

I think the power of changing the venue (to do any good) must be vested in the Judge of the County Courts, who alone can judge of the local circumstances that may call for its exercise. If entrusted to a Judge of the Superior Courts, it can lead to nothing but expense and evil, for one of those learned persons would be destitute of the requisite local knowledge, for which in such cases cunningly concocted affidavits will form an indifferent substitute. And if applications of this sort be dragged into the Superior Courts, it will enable the wealthy to oppress the poor, and tend to neutralise in part the benefits of Local Courts.

I am far from desiring to reflect generally on the County Courts juries. The great majority of the verdicts in my circuit have, I think, been fair and honest, and the disposition to do justice has commonly been most anxious. Juries summoned at the instance of men who hoped unduly to bias them have commonly decided against those very men.

Still I think it clear that a power of changing the venue should be given to the Judges of the County Courts;—a power that would, in all probability, be very rarely exercised,

and would act (as I have above intimated) more frequently as a preventive than as a cure.

I see no reason for thinking that the verdicts of juries in the County Courts are more commonly unsatisfactory than they are in the Superior Courts. My impression is, that as a general rule the contrary is the case. In each instance there are advantages and disadvantages. The juries at the Assizes (being selected from the whole county) are often free from local bias. But, on the other hand, in selecting juries from the more limited range of a County Court's district, the county clerk, knowing each individual, can choose the best men as regards integrity and intelligence.

Plaintiff and defendant, having also a personal knowledge of individuals, can object to those who are likely to be biassed or incompetent, which they may not generally be able to do as regards jurors taken from a large county, among whom may be many persons influenced by sinister motives, or corrupt or class interests, utterly unknown to the suitors, to whom they may be strangers.

Juries from the immediate neighbourhood have also themselves the advantage of knowing the personal characters of the parties and witnesses, which in many cases is almost the only clue to truth. There may be, and often are, point-blank contradictions in evidence on the most material facts of a case, without any tangible tests of the truth or falsehood of those conflicting statements, either in the testimony or in the demeanour of the respective parties. In such cases juries, like historians and men of common sense, can resort to character as a criterion of probability. I believe that in early times this was the very fundamental ground of the institution of Trial by Jury.

Bentham (to whose opinion on the subject I beg deferentially to subscribe) considered the prevalent forensic notion that the honesty or the dishonesty of witnesses could be detected by their "manner" as a popular fallacy (if too widely adopted). Cross examination will often elicit contradictions from fraudulent but plausible witnesses. It will, however, commonly fail to do so. Residents in country neighbourhoods will frequently meet with instances of cases

in which plausible rogues (known to be such by their neighbours) have grossly and ludicrously misled Judge and Jury at the Assizes. I can well recollect a case of the kind in the county in which I reside, where the most litigious and slippery knave in his neighbourhood obtained, by means of his venerable aspect and plausible demeanour in the witness-box, the commendations of a Chief Justice!

I think an alternative power might be given, viz. 1. either to change the venue, 2. or to summon a jury from a contiguous district.

In many instances the latter would be the cheaper course, especially on railways. The juror's expense of railway transit, which would commonly be trifling, would constitute the only difference in the cost between a trial by a jury from a home district or a foreign district. It may be worthy of consideration whether the whole or a part of such extra cost should not be borne by the public treasury. The entire amount throughout the country would be trifling, and it would form a safeguard against an abuse of Jury trial that would greatly strengthen public confidence in the dispensation of justice.

The Jury List might be furnished (in the case supposed) by the clerk of the Foreign Court.

With the changes above alluded to, I think that Jury trial in the County Court will act much better than it does at the Assizes. Jurors from a contiguous district would commonly unite local knowledge of persons and things with freedom from the peculiar excitement or other special influence affecting the home district, and would consist (being chosen by the county clerk of the foreign district) of individuals carefully selected and well known.

Here, however, I may remark, that the grounds on which a change of venue or jurors may be sought may render it expedient to remove the trial, not merely to a contiguous district, but to a very distant part of the kingdom. For example, in the case of an important dispute between two great magnates having land and dependents, and electioneering and other partisans, in three or four counties.

Nevertheless it is perfectly true that in nearly all cases in

the County Courts a change to the neighbouring district would suffice,—the influence to get rid of (in cases for moderate amounts) being generally that of some local attorney, usurious money-lender, or other incubus affecting the particular district only.

Even in County Courts cases, however, I would give a power of selecting jurors from districts at least sixty miles off.

I cannot dismiss this subject without observing on the extreme absurdity with which (while local or other improper influences are greedily assumed to affect the County Courts) the necessity of suppressing and guarding against similar influences in the Superior Courts, where their operation is most palpable and most extensive, is entirely overlooked.

What can be worse, more unreasonable or unsatisfactory, than the rules of the Superior Courts as regards venue? Can any thing work more unsatisfactorily than the system of Jury Trial frequently does in those Courts?

Again, it is often assumed that the Judges of the County Courts are always local gentlemen resident in the districts in which they act. Now what is the fact? Most of them have twelve separate districts, totally distinct from each other; from the nature of things, a Judge can reside in one only of those twelve neighbourhoods. I have myself twelve districts, and I do not live in any of them. Nor have I any relations or connections in the entire Circuit.

Do the Judges of the Superior Courts keep themselves entirely clear of all social intercourse with the inhabitants of their circuits? Quite the reverse. It is a positive custom (as we well know) for the Judges of Assize to dine with the leading man of the immediate neighbourhood at the assize town, who, possibly, may be, and commonly is, a plaintiff or a defendant before them the next day.

On this custom (for such it is) I presume to offer no opinion. To exclude the Judges from society on their circuits may involve perhaps as much harm as good. But the same rules of judgment must be applied generally and impartially.

That local influences have not warped or corrupted the decisions of the County Courts more generally than they

have those of the Superior Courts is sufficiently apparent from the confidence in the Judges of the County Courts, of which the small number of applications for juries is an unanswerable proof. And of those applications few (if any) can be ascribed to a distrust of the fairness of the Court.

I consider it impracticable to do full justice to the system of County Courts without simultaneous reforms in the other Courts of the country, and without introducing changes calculated to give to those Courts the same stability and authority as are possessed by other jurisdictions. With reference to this branch of the subject, I may allude to two topics—
1. The Law of Arrest for Debt; and, 2. The County Courts Law of Instalments.

1. As to the Law of Arrest for Debt.

In the County Courts a plaintiff who recovers a judgment for twenty-one pounds can take the goods of his debtor; but he cannot seize and imprison his person without proving fraud in contracting or dishonesty in neglecting to pay the debt; in other words, he can only punish *criminally* his debtor for the *crime* of swindling and knavery. He cannot incarcerate him for mere non-payment, which may be the result of unforeseen misfortune. Moreover, in the County Courts the period of imprisonment is restricted to forty days; though this punishment may (very properly) be repeated again and again for renewed acts of dishonest neglect to pay by a debtor having the means of payment.

Will our posterity, will foreign nations (who hear so much of the boasted impartiality and purity of our laws) believe that in a "Superior Court" a creditor has far higher privileges, absolutely different means of enforcing a debt of twenty-one pounds and upwards? He can imprison his debtor on non-payment, without proof of fraud or misconduct; he can incarcerate him indefinitely, subject only to the opportunity the law in such cases allows to the debtor to petition to be released as an insolvent on giving up to his creditors all that he has in the world.

As a humble Judge of a recently created jurisdiction, I am by no means ambitious that our Courts should be entrusted with the peculiar means of coercion and intimidation

which I have just described, as forming the especial "privileges" of higher tribunals. But it must be superfluous for me to say that it will be obvious that the coexistence of laws (as administered by two jurisdictions) essentially different and opposite, is not only a gross mockery and injustice, with reference to the principle of Local Courts, but with reference also to the rights and interests of the suitors, and of the people of this country.

Is it to be endured that non-payment of debts should be treated in one tribunal as a crime, in another as a misfortune, — that in cases above the magic limit of 50% non-payment should in all cases subject the debtor to incarceration, at the will of an intriguing, spiteful, or litigious creditor?

An able member of our Profession, who has turned to admirable account (for the purposes of an instructive fictitious narrative) the ordinary experience of the legal practitioner, has furnished a vivid picture of the abominations of the indiscriminate application of the Law of Arrest in cases of large amount. In his "Ten Thousand a Year," the author has described the position of a high-minded gentleman unexpectedly deprived by a lawsuit of a large estate of which he had honestly believed himself to be the lawful owner, and rendered liable at any moment to be incarcerated for the costs, at the will of the attorney for his opponent, one of the most degraded members of the legal profession.

2. As to the System of Instalments.

This system (which exists in the County Courts) should be extended to all Courts or excluded alike from all, as regards debts of the same nature and amount.

My impression is, that the mode in which debts can be enforced in the Superior Courts, by immediate execution and imprisonment, is injurious alike to debtor and creditor, and calculated to throw large powers of oppression (most mischievously for the public interests and for the public morals) into the hands of the lowest legal practitioners. And I can see no remedy for these evils, except in the power (granted to Courts) of allowing time for payment to the debtor. At the same time, I lean strongly to the opinion that this power ought to be used with the greatest possible caution—and (if

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I may be excused for using the expression) with some approach to severity—for otherwise the system of instalments (though it may relieve immediate distress) may have a tendency to foster (to some extent) habits of improvidence among the working classes and other sections of the community.

At the same time I am convinced that the evils of an indiscriminate system of immediate execution and arrest for debt are much greater, while a *remedy for any evils incident to the system of instalments will be found in the circumspection and increased strictness of the Judges*, — a result which may be reasonably expected.

As regards sums above twenty pounds, time is, I believe, very rarely and very sparingly granted by the Judges of the County Courts. I believe, however, that were the present severe system relaxed in the Superior Courts (as regards large amounts) the *bonâ fide* creditor would be a gainer; for the mere *dread* of extreme measures (which one vindictive or selfish creditor may put in force) is a fertile source of voluntary bankruptcies and other analogous schemes on the part of debtors, who under a different system of laws would commonly have maintained their position in life and met their engagements.

Creditors are often very bad judges of what is best for their own interests. Under the influence of irritation they are commonly prone to “kill the goose that lays the golden eggs,” to seek and obtain from the Legislature severe laws against debtors, which have no other effect, as a general rule, than that of throwing the debtor and all that he possesses (on the first temporary difficulty or partial pressure) into the hands of the “Quirks, Gammons, and Snaps” of the Law.

The first and most valuable protection that the capitalist can possess consists in care and caution in the selection of his customers. All other safeguards must be of very inferior efficacy, but next in importance may be named a lenient and temperate legal system of enforcing the payment of debts; which will encourage and enable the debtor, when unfortunate, to meet his creditors fairly and equally, instead of affording to him (as severe laws obviously do) strong motives

for playing into the hands of friends, and associates, and legal practitioners, to protect himself from beggary and imprisonment, the punishment of a felon.

The effect on the habits of the working classes of the old law of immediate execution, &c., (compared to the present system of instalments) is notorious, and I do not see why an equally beneficial effect should not be anticipated from analogous modifications of the law in cases of large amount, affecting the middle and higher classes of society. Mechanics and labourers who under the old law were in the habit of secreting their goods and often their persons, to avoid the extreme measures to which an adverse judgment exposed them, are now found to derive courage and hope from the opportunities afforded to them, and by gradual exertions to clear off their obligations.

But as I have already intimated the object of these remarks is not so much to point out the principles which I conceive ought to govern our laws, as to exhibit the absurdity of maintaining opposite principles in two different jurisdictions.

I have the honour to remain, dear Sir,

Yours very faithfully,

A JUDGE OF THE COUNTY COURTS.

Dec. 19. 1853.

ART. V.—THE USES OF THE GLOSSATORS AND THE COMMENTATORS.

No. I.¹

1. *Histoire du Droit Romain au Moyen Age.* Par F. C. DE SAVIGNY. Traduit de l'Allemand par M. Charles Guenoux, Docteur en Droit. Paris.
2. *Dissensiones Dominorum sive Controversiæ Veterum Juris Romani Interpretum qui Glossatores vocantur.* Edidit et Adnotationibus illustravit GUSTAVUS HAENEL, Lipsiensis. Lipsie, 1834.
3. *Compendium of Modern Civil Law.* By FERDINAND MACKELDEY. Edited by P. T. Kaufman, Vol. I. London, 1845.

THE ancient and deadly feud between the professors of the Civil or Imperial and those of the Common Law, which for so many centuries disturbed both courts and parliaments, has long terminated in the complete victory of our national jurisprudence. Notwithstanding the patronage and support of the great prelates of the English Church and the fostering care and encouragement of the august House of Stuart, the Civil Law has fallen within this part of the United Kingdom into neglect and decay. "*Quomodo unquam*," exclaims Pothier, "*quomodo unquam Papiniani olim prefecti sui nomen et doctrinam oblivioni tradere Britannia potuisset?*" But it is too true—the cobweb and the dust of ages rest undisturbed on many a volume rich with the accumulated wisdom of both ancient and modern sages—the fruits of two thousand years of meditation and toil! The foundations designed by the

¹ At a time when a general Digest of our Law may not unreasonably be expected, when even the Lord Chancellor announces from the woolsack the possibility of a *Code Victoria*, we think it may be useful to revert to the sources not only of our own law, but that of all civilised nations: and let not the student, or even he who is called the "practical man," turn with distaste from these disquisitions. The demand is now for liberal and extended views on the whole subject; and even in arguing cases, such views are much listened to and desired. "The Law University," branches of which are fast springing up in spite of all opposition, will foster and develop this state of things, and while to the next generation of lawyers this learning will become a necessity, even the advocate of the present hour will be forced to admit its use.—Ed.

wise munificence of holy bishops for the encouragement and support of men trained to be the learned servants and advisers of the Church are given to strangers; and even the judges of the Courts which profess to follow the Civil and Canon Law lend a more willing ear to Adolphus and Ellis, and Vesey, Junior, than to Justinian and Gratian.

The leading causes of this decadence of the learning of civilians in England are matter of history; but some portion of the state of things which we lament is also to be attributed to prejudices arising from a misconception of the system itself. With one of those prejudices we propose to deal in a general way in the following pages. It is this.

Our Common Law authorities have long been accustomed to boast of the paucity of commentators on their jurisprudence as contrasted with the number and bulk of those who have written on the Civil and Canon Law. This is an old weapon of war upon the civilians; and in our own days, whenever any matter of Civil or Canon Law comes in question before our English Courts, both judges and council are ever ready to make merry about the "ponderous tomes" and unknown names of the famous European lawyers who are necessarily cited before them. They are apt to be perplexed by the conflicting opinions of the commentators, and to think the whole system a chaos so unbounded and so incomprehensible that the condition of judges compelled to conform their decisions to its rules must be miserable and absurd. We cannot wonder that this impression should exist; it arises from the want of discrimination between the genius and spirit of the Civil Law and those of our National Law.

The English Law is based (except so far as it consists of statutes) on authorities which, though they are evidence of what the Law is, yet are not Law—we mean adjudged cases. Thus we find it laid down that "the judgments of the Courts of Westminster Hall are the only authority we have for by far the greatest part of the Law of England."¹ The Law is only to be found in the judgments, and the judgments profess to be according to the Law. The consequence of

¹ 3 Bing. 588.

this is that the chief toil of the Judge is to decide according to the authorities; and where the cases are conflicting, he must strive to discover on which side the balance of authority lies, and decide accordingly. There are many different circumstances which may increase or diminish the authority of a decided case, and the Judge must consider the conflicting cases with reference to all such circumstances, so as to give to each the weight to which it is entitled. And again, often the Judge must endeavour to reconcile apparently conflicting cases so as to decide without overruling any of them, by assuming them to be governed by the same principle of Law. Sometimes this is a very arduous undertaking. Thus Lord Eldon says: "I have looked through the case of *Moody v. Walters*¹, and all the cases to which in delivering that judgment my attention was drawn; a judgment which was the result of a very anxious endeavour to examine every authority upon the subject; and with all these cases I find myself in a situation very trying to a Judge; as the task of deducing from them what is the true principle is greater than I have abilities well to execute."² So the great majority of cases are decided by weighing the previous decisions one against the other, or showing them to be distinguishable from that *sub judice*. This elaborate examination of cases is especially a characteristic of Lord Eldon's decisions. That great Judge seldom lays down any rule or principle, but he reviews the previous decisions and decides according to the balance of authority, in many instances by a mere process of comparison, and without any train of reasoning arising from the grounds of the cases which he enumerates. He assumes the cases to be governed by one principle, and then, by deciding according to the cases, he keeps within the principle. It follows from this characteristic feature of the English Law—that the genius of that system is a great reverence for what are technically called "the Authorities," which, under certain circumstances, have the weight of Law, and are always *primâ facie*, binding on the Courts.

We frequently find that Common lawyers assume that the

¹ 16 Ves. 283.

² 1 Ves. & B. 491., and see 492.

Civil Law is similar in this important particular Law, and hence great confusion and difficulty as they have to deal with Civil Law. Hence all the against the commentators, and all that prejudicial Law itself. But this is an important error in both the Civil and the Canon Law, as we will now show.

The Civil Law consists of a *corpus juris*, which vigour as written or as unwritten Law, is *lex* as it is in force. In some countries it obtains *ratum* in others *rationes imperio*; in some by enactment by usage; and in some a greater and in others thereof is received: but everywhere, so far as it is *lex ipsa*. To show how great is the extent of this system of Law, it is sufficient to mention the *Decrets*, which are the principal part thereof, contain passages of 2,000 volumes, consisting of three volumes, condensed into a hundred and fifty thousand and that the materials of which the compilations of the commissioners were composed had accumulated space of a thousand four hundred years.¹ They are of the legal philosophy and learned experience of the wisest and most learned nations of antiquity during a hundred years.

As for the Canon Law, it also consists of a *corpus* which is Law so far as it is in force and received. The Decree of Gratian contains the substance of ecclesiastical discipline as it existed in the twelfth century; mingled with the apocryphal decretals; but still setting forth the chief features and more important details, all the principles, and the essential spirit of the Church constitution, as they prevail at the present time, less completely in different countries. The book of Gregory IX., compiled by St. Raymond of Peñafort, contains the Papal Laws promulgated down to that pontiff, who lived in the beginning of the thirteenth century. The subjects to which they relate have been

¹ Gravina Orig. cxxxii.; Constit. Tanta. ss. 1. 19.; Constit. s. 5.

these five words, which suffice to show that their extent is considerable: *Judex, Judicium, Clerus, Connubia, Crimen*. Next comes the "*Sextus Decretalium Liber*," compiled and promulgated by Pope Boniface VIII., in the year 1297, containing the decretals subsequent to the former work. Then follow the Clementines, compiled by Clement V., and published by John XXII., in the year 1317. Besides these books there are the "*Extravagantes Johannis XXII.*," and the "*Extravagantes Communes*." This is a great body of Law. And the learned reader will remember that whenever any question of Equity arises, the canonists make use of laws and doctrines taken from the *Corpus Juris Civilis*, so that the Civil Law, considered as written reason, is a part of the Canon Law.

In these authentic bodies of Law, the Civil Law and Canon Law are contained — *they are the Civil and Canon Law themselves*. The consequence of this is, that in both laws the authority of decided cases and of commentators is of a circumscribed and qualified nature, when compared to the authority of decisions in the English Law. Neither the cases nor the commentators are the only, nor even the best, evidence of what the Civil and Canon Law are, because there is the Law itself; and thus the Court must look at the Law rather than at the authorities. This is expressly laid down in many well-known laws contained in the *Corpus Juris Civilis*; and it is consonant to reason.¹ It is true that the authorities contain the exposition and magisterial construction of the Law; but still they do not contain the Law, and they are of no weight except so far as they are according to Law.

Now let us see how these facts and principles bear upon the alleged enormous mass of glosses and comments under which the Civil and Canon Law are supposed to be overwhelmed. If the Law were to be sought in those ponderous volumes, there would be good ground for the reproaches of the Common lawyers. But we have shown that this is not the

¹ Lib. xiii. Cod. De Sent. et Interloc.; lib. xiii. ff. De Offic. Pres.; s. ult. Inst. de Satisfat.; lib. iv. Cod. De Sent. et Interloc.; lib. lxiii. ff. De Ore Judic.

case; they are neither the Civil nor the Common Law; they are only guides and advisers, and, as it were, assessors of the Courts, which are to decide by the Law. Viewed in this light, they are the means of furnishing inestimable assistance instead of causing embarrassment to the Courts. They are, it is true, extremely numerous, and often very bulky; but this does not arise from the vague, uncertain, and doubtful nature of the Law. It is easily accounted for by the fact that during seven centuries the learned of the entire continent of Europe have been engaged in the illustration and elucidation of the Law, and have written in the common tongue of the republic of letters. Another cause which has contributed to the increase of comments is the dogmatical and didactic way in which the Civil and Canon Law were cultivated in the universities apart from the practice of the Law in the Courts. But all these things will appear more clearly in the following pages, where we propose to review the history of that long line of illustrious writers who, since the first commencement of the school of Bologna, have brought the Civil Law to its present high state of excellence.

It is unnecessary to discuss the story of the discovery of the Pandects of Amalphi. The acuteness of Gibbon led him to doubt a legend resting on such slender evidence; and it has now been entirely exploded by the learned Savigny, who shows that the Civil Law in reality never became extinct in Italy, notwithstanding the invasion of the barbarians. That writer indeed observes, that if the Roman Law had been completely destroyed before the twelfth century, it would, with great difficulty, have been revived; whereas it had never ceased to exist, and therefore nothing remained to be done but to study its meaning and extend its application.¹ A variety of circumstances concurred to bring about the restoration of that great science which first commenced at Bologna. The populous, rich, and powerful cities of Lombardy found the Germanic law totally insufficient for the wants of their advanced state of commercial prosperity and civilisation. Their municipal constitutions and the principle of association tended to throw into oblivion the old personal

¹ Savigny, *Hist.*, vol. iii. p. 67.

law. The want of a common law for European Christendom, which, since the reign of Charlemagne, was considered to be united by the bonds of empire, religion, church, and even the Latin language, was naturally supplied by the Roman jurisprudence. All these circumstances together contributed to foment and assist the development of the Civil Law, and to produce the famous school of Bologna. That school commenced with the commentators who are known by the name of the *Glossators*. Let us now see what account Savigny gives of the *Glosses*, from which they took their name: —

“ Si maintenant on demande ce que c'était que les gloses, je répondrai, des Commentaires qu'un jurisconsulte insérerait dans son exemplaire du texte pour qu'ils fussent conservés, copiés et répandus comme tous les ouvrages. Ordinairement on ne connaissait les gloses des jurisconsultes qu'après sa mort, car il travaillait toujours à les corriger et à les compléter. Quelquefois aussi, l'auteur les faisait connaître de son vivant, et s'il les modifiait ensuite, on en avait des différents textes. Dans tous les cas, pour qu'on pût les distinguer des gloses d'autres jurisconsultes, elles étaient accompagnées du sigle de l'auteur.

“ Quoique les gloses d'un jurisconsulte fussent bien distinctes de ses leçons, cependant elles avaient entre elles des analogies de plus d'un genre. Dans les gloses un jurisconsulte résumait ce qu'il savait de meilleur et de plus original sur une loi ; tandis que dans ses leçons il ne dédaignait pas d'entrer dans des détails faciles à comprendre et connus généralement. Ainsi donc les jurisconsultes inséraient ordinairement leurs gloses dans leurs cours, ce qui contribuait à les faire connaître.

“ Dans l'origine les gloses étaient des courtes explications d'un mot difficile placées entre les lignes de texte (gloses interlinéaires), ou bien des explications plus étendues et placées en marge qui peu à peu formèrent une espèce de commentaire perpétuel. De là aussi l'étymologie du mot glose. Glose, qui dans les anciens grammairiens désignait une expression inintelligible ou obscure, reçut par la suite une double extension. D'abord on appela glose l'interprétation de ce mot inintelligible par un mot connu et synonyme, puis on appela glose tout commentaire, même celui qui avait pour objet non les mots du texte mais le fond des choses. On ignore si les anciens auteurs Latins donnaient déjà au mot glose la première extension, mais Isidore la lui donne formelle-

ment.¹ Ce nom convenait donc très bien aux explications du texte que faisaient les premiers juriconsultes de Bologne : Irnerius par exemple. Lorsque ces explications littérales se furent changées par degrés en véritables commentaires, il n'était pas moins naturel de leur conserver le nom de glose. Ce dernier sens, qui s'éloigne beaucoup du sens primitif, était déjà bien établi au douzième siècle. On ne doit pas non plus oublier l'analogie qui présentaient le nom de la glose interlinéaire de la Bible, dont la première était généralement répandue dès le milieu du neuvième siècle. Bientôt, par une prononciation plus douce, de *glossa* on fit *glosa*, forme qui s'est conservée dans le mot Français *glose*, et dans les mots Italiens *chiosa*, *ghiosa*, et *glosa*. Peut-être encore, par une erreur de copistes ou par une fausse étymologie, de *glosula* a-t-on fait *clausula*.

"Ainsi donc les gloses proprement dites ont pris naissance à Bologne. On n'en trouve aucune trace certaine dans aucune autre école de droit d'Italie ou de France ; et ce n'est qu'à Bologne qu'on les voit se conserver et se répandre."²

Some modern writers have thought that the Glosses were the courses of teaching or lectures which the first doctors gave to their scholars. It, however, appears from Savigny, that this is an error, and that the Glosses were magisterial and profoundly studied comments, on which the doctors staked their reputation, and which they accordingly corrected and polished with the utmost care. This is a very important point with reference to the use and authority of those writings.

There are different kinds of Glosses, and their characteristic features must not be omitted here. The *Authentica* are passages from some other part of the Corpus Juris relating to the same subject matter as the text commented upon, and serve to show how that text is modified or abrogated by a subsequent law. Of an analogous nature are the parallel passages, which are to be found in great numbers in the compiled gloss of Accursius ; and the utility of both, even at the present day, is great and obvious.³

Apparatus is a gloss in which all the parts of a text are so

¹ Isidor. Orig. I. de Glossis.

² Savigny, Hist., vol. iii. p. 392.

³ Ibid. p. 397.

completely explained, that it may be considered as a full comment.¹

There are other species of compositions which have an analogy with the Glosses, also deriving their origin from the courses of teaching of the schools. *Summæ* are commentaries containing the whole substance of a title; *Casus* were collections of imaginary cases framed for the purpose of explaining and illustrating a text; and *Brocarda*, *Brocardi*, or *Brocardica*, are general rules drawn from the text of the Law. There were also disputations and *dissensiones domino-rum*, or controversies of the doctors.² Such are the general forms of the writings produced by the early Italian civilians.

But let us now take a view of the glossators themselves; and first of Irnerius, the founder of the school. Savigny tells us that he was a Bolognese, and not a German, as has been supposed; but however this may be, he was undoubtedly a person of great consequence, besides being the first law professor of the Bolognese University. He held important trusts under the Countess Matilda and the Emperor Henry V.; and in 1118 the latter confided to him a high office at Rome. Thus he was both a lawyer and a public man.

He is represented by the glossators to have been a most profound dialectician and subtle commentator, but there is not enough of his works remaining to enable us to form a satisfactory opinion of his merits.³ He wrote both interlinear and marginal glosses, and also the *authentica* of the Code, showing where constitutions contained in the Code were abrogated or modified by the novels, and these are the authentics now in use.

Irnerius was succeeded after an interval by four doctors,—Bulgarus, Martinus, Jacobus, and Hugo,—who about the middle of the twelfth century, shared the glory of being the oracles of jurisprudence, and are called the four Doctors, or the four Masters. They were commissioned by the Emperor Frederick I. to determine the *jura regalia* of the Empire, which had been to a great extent usurped by the cities; but

¹ Savigny, p. 398.

² Ibid. pp. 398, 399.

³ Ibid. vol. iv. pp. 10—14.

they refused to undertake by themselves so heavy a responsibility, and the Emperor, therefore, appointed twenty-eight Judges, two chosen from each city, to act with them. That assembly, known as the Diet of Roncaglia, laid down the principle that all the *jura regalia* which they had recognised and certified belonged to the Imperial Crown except so far as the cities could produce grants or renunciations from the Crown. We thus find the Bolognese doctors playing an important part in the public affairs of the times. They have not escaped the blame of Sismondi and Raumer, who accuse them of too great a leaning towards the Crown and the subtleties of the Roman Law. We must, however, remember that those writers are not lawyers, and therefore we ought to prefer the testimony of Savigny, who defends the four Masters from those imputations. It must, however, be acknowledged that one of them at least¹ had somewhat of the courtier, if we may rely on the following anecdote. The Emperor was riding with Martinus and Bulgarus, and asked them whether the world belonged to his crown. Martinus answered in the affirmative, and Bulgarus in the negative, at least as regarded the right of property; thereupon the Emperor made Martinus a present of a horse, while Bulgarus consoled himself with an epigram for the greater favour of his colleague: *Amisi equum quia dixi Æquum quod non fuit Æquum*. The opinion of Martinus in its popular meaning is too extravagant to be authentic, and we must interpret it as applying to the Roman world, and to the feudal law of tenure.²

Martinus seems to have enjoyed the confidence of the Emperor, as appears from another anecdote related by Savigny. There is a rescript in Justinian's Code³ which decides that when a sale made by a minor is ratified during his minority by oath, it cannot be set aside. This rescript was a subject of controversy among the ancient glossators. Bulgarus held that its principle applied only to acts valid *ipso jure*, but which might be set aside by *restitutio in integrum*, and that the effect of the oath was to bar that

¹ Savigny, Hist., vol. iv. p. 43.

² Ibid. pp. 44, 45.

³ Lib. i. chap. Si Adversus Venditionem.

remedy. Martinus, on the contrary, maintained that according to the meaning and principle of the rescript, acts not merely voidable, but *null and void*, were rendered valid by confirmation by oath. The question was submitted to the Emperor by the doctors, and was determined by him in favour of Martinus.¹ The opinion of Bulgarus, however, seems to be the most solid. It is thus explained by Azo:—
 “This law is to be understood according to the opinion of Bulgarus; that is to say, it applies to the case where the minor sold under a decree, and with the consent of his guardian . . . but if the sale (for want of those forms) was null and void, then *non confirmat quod de jure non tenuit*.”
 According to principle, an act which is null and void cannot be confirmed, for the confirmation cannot operate on a mere nullity. Savigny tells us that the opinion of Martinus, embodied in the Emperor's decision, has been severely censured by the glossators, and indeed it seems that a retribution fell on him, for his family was ruined by the extravagance of a minor.

This anecdote gives a curious example of the weight which attached in those times to the opinion of the schools. The glossators did not acquiesce in an erroneous opinion, even when sanctioned by an imperial decision, and it is not followed in the modern Civil Law. This we find in Voet², and Grotius shows that an oath is not valid if it purports to bind the person to anything contrary to law³, a principle applicable to the opinion of Bulgarus.

He was a most honourable and upright man; but that we may not be accused of partiality towards the glossators, we will not slur over the fact, that the celebrated Albericus à Porta Ravenunte, the best known of the immediate successors of the four masters, was of a very different character. He seems to have been much given to eating and drinking, and by no means ready to abide by his opinions, when they militated against his interest. The following quaint anecdote is

¹ Savigny, *Hist.*, vol. iv. p. 45.

² Voet. ad Pand., lib. iv. tit. iv. s. 47.

³ Grot. *D. de la G.*, and *de la P.*; liv. ii. chap. xiii., s. vi., and see s. xvi.

little in accordance with the gravity of one of the Domini Doctores :—

“ Quidam scholares,” says Odofredus, “ invitaverunt ad prandium Dominum Albericum, qui libenter comedebat et bibebat cum aliis. Dum esset in mensâ Dominus Albericus cum scholaribus illis, illi scholares dabant ei optimum vinum rubeum. Dixit Dominus Albericus : istum vinum est nimis forte, immisceatis aquam. Ipsi scholares immiscebant vinum album quod videbatur aqua unde eum inebriaverunt. Eo inebriato induxerunt ad fidemjubendum et ad accommodandum scripta sua.”¹

Odofredus, however, seems to have been rather given to scandal, for he says of the glossator Lotharius, *fuit homo qui multum placebat dominibus unde fuit electus archiepiscopus Pisanus.*²

Passing over the intermediate doctors, we will go at once to Vacarius and his contemporaries, of whom Savigny gives an interesting account. The learned writer, after showing that Selden fell into the error of identifying Vacarius with two other persons, Rogerius, Abbot of Bec, and the celebrated glossator Rogerius, continues as follows :—

“ Johannes Sarisberiensis rapporte l'introduction du droit Romain en Angleterre à un voyage que fit à Rome Théobald, Archevêque du Canterbury, par suite de ces différends avec Henry, Evêque du Winchester. L'Archevêque s'était pourvu devant Celestin II., qui, élu en 1143, mourut du commencement de l'année suivante. Cette affaire donna lieu à des débats et à des appels jusque-là sans exemple ; ces débats firent connaître en les livres de droit en Angleterre et y amenèrent des jurisconsultes dont le premier fut Vacarius. Ce témoignage de Johannes Sarisberiensis est confirmé par Gervasius, dont le récit ce peut se traduire ainsi : Théobald voyant l'influence qu'exerçait sur les affaires les jurisconsultes formés à la nouvelle école, acheta des manuscrits de droit, et amena avec lui en Angleterre des jurisconsultes dont le premier fut Vacarius. Plusieurs auteurs ne concevant pas que le droit Romain fût applicable à un procès entre deux évêques sur des matières ecclésiastiques, ont pensé qu'il s'agissait ici du droit Canon, et que l'enseignement de Vacarius n'avait pas d'autre objet.³ Mais le droit Canon avait toujours fait parti de l'enseignement théolo-

¹ Savigny, Hist., vol. iv. p. 53. not. 12.

² Ibid. p. 84. not. 9.

³ Wenck, Magister Vacarius, pp. 22. 25.

gique, et le décret de Gratien n'apporta pas de grand changement à cette matière. D'un autre côté on sait que la procédure devant les tribunaux ecclésiastiques est en grand partie fondée sur le droit Romain ; il n'est donc pas étonnant que l'Archévêque du Canterbury, à l'occasion de ces procès devant la cour de Rome ait fait venir en Angleterre des livres et des professeurs de droit civil, et qu'un semblable besoin ne se fit nullement sentir pour le droit Canon.

"Gervasius nous apprend que le droit Romain parut alors chose toute nouvelle. En effet, depuis la chute de la domination Romaine en Angleterre, il avait cessé d'avoir aucune application pratique, et comme science, à peine était-il connu.

"On sait par la chronique de Robert que Vacarius était Lombard ; mais ceux qui ajoutent qu'avant son voyage en Angleterre il professait avec distinction à Bologne, ne se fondent que sur des conjectures très-hasardées.

"Vacarius fonda son école à Oxford. Mais bientôt Etienne, voulant étouffer le droit Romain en Angleterre, ordonna la destruction de tous les manuscrits, et défendit à Vacarius d'enseigner. Cette ordonnance, qui n'eut aucun résultat, paraît avoir été révoquée par Etienne ou par son successeur. En effet, le Pape Alexandre III., dans une décrétale de 1164 nomme des commissaires pour examiner une question de mariage, et parmi eux figure Magister Vacarius. Une autre décrétale de 1170, qui concerne Vacarius, lui donne le titre de Chanoine, d'où il paraît résulter que Vacarius était entré dans les ordres, sans néanmoins renoncer à l'enseignement."¹

Savigny traces the influence of the school of Vacarius in the works of John of Salisbury, Petrus Blecensis, and Silvester Giraldus, or Giraldus Cambrensis.

We come now to Azo, who died about the year 1230. He occupies a very distinguished place in the history of the glossators. His glosses form a more complete and systematic work than those of his predecessors, and were of the species called *apparatus*, especially those on the *Digestum Vetus* and the Code. But his reputation is founded on his *Summæ* on the Code and the Institutes, which superseded all other works of that kind², and which is sometimes useful even at the present time.³

¹ Savigny, Hist., vol. iv. pp. 91, 92.

² Ibid. p. 98, 99. 102. ; Panzirol. De Clar. Leg. Interpret., p. 401.

³ Terrasson, Hist. de la Jurisp. Rom., p. 437.

Among the pupils of Azo was a man who surpassed him in reputation,—Accursius, the most celebrated of the glossators. But before we proceed to him and his works, let us see how Savigny sums up the labours of the glossators during the first 150 years from their commencement.

“ L'exégèse formait l'objet exclusif de l'enseignement oral des glossateurs, la matière de presque tous leurs écrits, et ils obtinrent les plus heureux résultats de cette étude constante des sources jointe à une merveilleuse sagacité. La caractéristique de leur méthode est d'offrir les développements les plus riches, les rapprochements les plus nombreux, sans généralités, sans digressions, sans se détourner un instant de leur but. Sous ce rapport, les juriconsultes, d'ailleurs plus savants, de l'école française et hollandaise, sont souvent inférieur aux glossateurs, et nous ne pourrions que gagner à les prendre en cela pour modèles. On doit aussi louer les glossateurs de ce qu'ils ont fait pour la critique des textes, et souhaiter de voir mettre à profit les nombreuses variantes que renferment leurs ouvrages.

“ L'exégèse conduisait naturellement aux travaux dogmatiques. Les plus importants sont les sommes sur le Code et les Institutes qui se prêtent le mieux au résumé des principes du Droit Romain. On doit aussi ranger dans cette classe les traités sur des parties spéciales du droit, notamment sur les actions. Tous ces ouvrages prouvent combien les glossateurs avaient approfondi les divers éléments dont la réunion peut seule conduire à la science complète du Droit. Sans doute, les recherches historiques manquent chez les glossateurs, mais ce défaut était inévitable, et nous-mêmes que saurions-nous sur l'histoire intérieure du Droit si, indépendamment des découvertes modernes, Ulpian et quelques autres juriconsultes antérieurs à Justinien n'en eussent été retrouvés au seizième siècle.

“ L'appréciation complète des traités sur la théorie de la procédure et des recueils de formules ne trouve sa place que dans une histoire spéciale de la procédure.

“ Les recueils de formules, surtout celui de Roffredus, présagent déjà la décadence de la science. On voit que leurs auteurs travaillaient pour cette classe de lecteurs qui font de la pratique du droit un métier purement mécanique.

“ Pendant long-temps les glossateurs et les canonistes formèrent deux classes entièrement distinctes. Mais peu-à-peu les canonistes regardèrent le droit Romain comme partie intégrante de leurs études, et les glossateurs invoquèrent, dans leurs ouvrages, les principes du Droit Canon. Bazinus, chanoine de Bologne, Nicolaus

Furiosus et Lanfrancus, sont les premiers qui aient enseigné le Droit Canon et le Droit Romain : plus tard on trouve une foule d'exemples semblables.

“ La mérite des glossateurs pour le temps où ils vécurent est immense, et ne peut être prisé trop haut. Nonseulement ils ont ressuscité la science du Droit, mais les autres sciences leur doivent encore d'avoir éveillé cette activité que l'on voit se déployer dans tant d'écoles florissantes. Quoique les travaux des glossateurs aient été continués pendant plusieurs siècles et dans des circonstances plus favorables, nous avons encore beaucoup à apprendre de leurs ouvrages. En effet, combien de choses dans la jurisprudence des temps modernes dont on ne peut approfondir le sens qu'en remontant à leur origine, c'est-à-dire, aux écrits des glossateurs.

“ Lorsqu'au seizième siècle on applique à la science du Droit les connaissances qui manquaient aux glossateurs, leur réputation dut nécessairement en souffrir. Chose remarquable, l'illustre chef de cette nouvelle école, Cujas, a rendu un éclatant témoignage au mérite des glossateurs ; mais ils trouvèrent presque partout une injuste sévérité, et ce qui est vraiment déplorable, leurs ouvrages tombèrent en oubli. La plupart de ceux qui en parlent ne font que répéter les anciennes critiques. Ainsi, on a recueilli un grand nombre de passages pour prouver que les glossateurs ignorent la philologie et l'histoire, et manquaient à la fois de bon sens et de goût. On pourrait répondre, qu'une foule de connaissances aujourd'hui très-faciles à acquérir, étaient presque inaccessibles au douzième siècle. Cet argument, bon pour exculper les glossateurs, ne prouverait nullement le mérite de leurs ouvrages. Mais voici sur cette question, deux observations qui me paraissent décisives.

“ D'abord, tous les passages des glossateurs que l'on cite sont tirés de la glose d'Accurse, compilation sans critique, composée de fragments empruntés à tous les ouvrages faits depuis le commencement du douzième siècle. C'est précisément comme si l'on jugeait l'état actuel de la science d'après les erreurs que l'on pourrait relever dans tous les livres écrits depuis 150 ans. Mais que l'on prenne les ouvrages originaux des glossateurs, par exemple le traité de Bulgarus, ‘ De Regulis Juris,’ ou celui de Placentinus sur les actions, on y trouvera matière à critiquer beaucoup moins ample que dans la glose d'Accurse. Ensuite, il est incontestable que les glossateurs ignoraient une foule de choses que tout le monde sait aujourd'hui ; mais si l'on songe au mérite éminent que tout esprit impartial doit reconnaître en eux, ces obstacles mêmes doivent

ajouter un nouveau prix à leurs ouvrages et redoubler notre admiration. Cujas a été accusé de contradiction pour avoir, plus d'une fois, réfuté sévèrement les erreurs des glossateurs; mais ces critiques de détails me semblent plutôt confirmer les éloges qu'il leur donne ailleurs sans restriction."

"Enfin, on a reproché aux glossateurs d'avoir par leur servile attachement au parti Gibelin, favorisé le despotisme et nui à la liberté.¹ J'ai déjà répondu à ce reproche en parlant de la diète de Roncaglia. J'ajouterai seulement ici qu'une accusation générale portée contre toute une classe est nécessairement injuste; que les jurisconsultes, par la nature de leurs études, sont portés à défendre la liberté légale contre l'arbitraire des révolutions ou du despotisme; et que plus d'une fois on les a vus soutenir noblement ce caractère de modération."²

This valuable passage shows what use the modern civilian may derive from the glossators. Their opinions are not to be taken as Law, nor as binding on the judge, and their works are in great measure superseded by later comments; but their acute and elaborate interpretation of texts renders them useful wherever the meaning and construction of a law is in question.

In the middle of the thirteenth century the old glosses were held to be of the same authority as the text, because legal science was in an unsound condition at that time, and the civilians found the gloss easier to understand than the law; but that was an error which has long been completely exploded. Let us now return to Accursius.

The reputation of that great doctor is built on the *Glossa Ordinaria*; which consists of a sort of digest of anterior glosses, and the treatises and *summæ* of the glossators, to which compilation he added a gloss of his own. But we must see the account which Savigny gives of that famous work:—

"Sans doute on doit louer Accurse d'avoir embrassé dans son plan, outre les glosses détachées, les traités et les sommes des glossateurs. Mais a-t-il su apprécier le mérite des riches matériaux qu'il avait à mettre en œuvre? C'est une question qu'on ne saurait résoudre complètement tant que la plupart des anciennes glosses resteront

¹ Sismondi, Hist. des Répub. Ital., t. i. p. 368., t. ii. p. 102.

² Savigny, Hist., t. iv. pp. 134—138.

inédites. Néanmoins, si j'en juge d'après celles que j'ai comparées à la glose d'Accurse, il est permis d'en douter. Ainsi, par exemple, Accurse préfère Irnerius et Bulgarus à Pillius et Placentinus, et il rapporte les anciennes gloses interlinéaires à l'exclusion de gloses bien autrement importantes. Ces gloses interlinéaires, bonnes pour le temps ou elles ont été faites, sont fort déplacées dans ce recueil, et lui donnent une apparence de puérilité dont il faut accuser le compilateur et non les auteurs originaux.

* * * * *

“Le recueil d'Accurse pouvait encore rendre un grand service à la théorie et à la pratique du Droit, en réunissant les controverses des glossateurs dispersées dans un grand nombre de manuscrits, et en donnant aux controverses une solution que l'autorité de son nom aurait rendue définitive. Quant à la théorie, il suffit d'étudier la glose pour voir combien il est difficile, ou plutôt impossible, de connaître par cet étude l'état des questions controversées. Quant à la pratique, l'histoire nous montre que le but n'a pas été atteint. En effet, dans les siècles suivants on aurait bien voulu adopter sans examen la solution d'Accurse, mais comme souvent cette solution n'existe pas, on eut recours pour y suppléer à différents systèmes. Diplovataccius, dans la vie d'Accurse, expose un de ces systèmes, dont voici le résumé. Dans les cas douteux, la dernière opinion est regardée comme celle d'Accurse, et doit l'emporter sur toutes les autres. Néanmoins cette règle cesse d'être applicable, 1. si une des opinions précédentes s'appuie sur de meilleurs arguments; 2. si la dernière opinion se conforme à la rigueur du droit, et une des premières à l'équité; 3. si la dernière opinion commence par un *tamen alii*, ou *quidam*; 4. si une des premières est favorable au mariage ou à l'Eglise. Il faut voir sur quels arguments, sur quelles autorités, sont fondées ces règles et ces exceptions, pour comprendre à quel abaissement la science du Droit était réduite pour enfanter de pareils systèmes.”¹

Such a system as this can only be justified on the ground of the incompetency of the judge to comprehend the text, for it compels him to bow to the opinion—or presumed opinion—of Accursius, or, at least, to decide by a servile adherence to the gloss.

“La glose a pour nous une grande valeur historique, parceque

¹ Savigny, Hist., vol. iv. pp. 148, 149.

la plupart des écrits mis en œuvre par Accurse sont perdus ou inédits. Elle a en outre rendu à la science le même service que le recueil de Justinien. En effet, elle a conservé la mémoire des glossateurs et de leurs ouvrages, mieux qu'aurait pu le faire les ouvrages originaux eux-mêmes, quoique beaucoup meilleurs ; et s'il nous est permis aujourd'hui, par une étude plus profonde, de nous instruire à l'école des glossateurs, c'est parceque la glose d'Accurse a rattaché la littérature du Droit de cette époque à celle des temps postérieurs.

"Le succès de la glose fut immense ; elle obtint force de loi devant les tribunaux, et son auteur acquit une gloire dont aucun jurisconsulte n'avait joui avant lui. Ainsi, lorsqu'en 1306, les Gibelins (Lambertazzi) furent écrasés par les Gualfes (Geremei), on rendit une loi qui accordait à la famille d'Accurse les privilèges du parti vainqueur.

"L'influence de la glose, et la réputation d'Accurse, s'expliquent aisément. La glose embrassait toutes les parties du corps du Droit, réunissait les gloses éparses dans une foule de manuscrits, et paraissait à une de ces époques de décadence ou une compilation commode est préférée aux œuvres du génie. Il n'est pas vrai qu'Accurse ait fait sanctionner sa glose par l'autorité législative, et si plus tard quelques villes lui ont donné force de loi, on ne doit voir là que la reconnaissance d'une fait dès longtemps accompli.

"Le plan de ce recueil, son exécution plus qu'imparfaite et son immense succès, attestent la décadence de la science. Sans doute Accurse n'a pas amené cette décadence, mais il y a contribué pour sa part, en donnant un point de ralliement à une méthode pernicieuse. Bientôt on vit des jurisconsultes abandonner l'étude immédiate des textes, et prendre la glose pour matière de leurs leçons et de leurs ouvrages. Odofredus se vante d'avoir le premier expliqué les gloses dans son cours, méthode qui tous les jours fit de nouveau progrès.

"L'autorité exclusive de la glose une fois établie, on cessa de lire et de copier les anciennes gloses ; souvent même on les détruisait matériellement, et l'on peut voir dans plusieurs manuscrits, que d'anciennes gloses ont été grattées pour faire place à la glose d'Accurse."¹

With Accursius, the glossators properly so called came to an end, either because the matter for glosses was supposed

¹ Savigny, *Hist.*, vol. iv. pp. 149, 150, 151.

to be exhausted, or because the subsequent civilians aspired to the honour of writing more voluminous commentaries.¹ Savigny seems rather severe on the Accursitan Gloss, of which Terrasson speaks much more favourably. While he acknowledges its faults, he says that it contains excellent things; that the style of Accursius is precise, and his phrases neat, and that he has successfully explained many obscure laws. Terrasson adds, that where there is a difference of opinion among the authorities, he usually is on the better side.² It is, indeed, undeniable that the gloss often affords an easy and clear explanation of many obscure passages in the Corpus Juris, whereby much trouble and time are saved, and it accompanies the text in a very convenient way. We, however, fully agree with Savigny that it ought not to cast into oblivion the works of the older glossators, especially where there is a difference of opinion and a controverted question among them. And thus the learned Haenel, in the Preface to his edition of the "*Dissensiones Dominorum*," says of them:—

"Debemus enim in illis non solum acumen ingenii verum etiam animi constantiam admirari, qui omnibus fere subsidiis quibus nostra ætate instructi sumus destituti, ex ingentis molis voluminibus sæpissime corrupti scriptis, disjecta doctrinæ membra conquirebant atque ordinabant, et quæ inter se pugnare viderentur tam perite conciliabant ut etiamnunc in jure controversæ multas eorum opiniones quanquam auctorum nomen reticentes teneamus et in foro sequi non dedignemur. Omnino illi juris libros quos possidebant tam diligenter tractabant, ut eos memoria tenerent, tam docte et jucunde interpretabantur ut incredibilis nobilissimorum ex omnibus Europæ partibus juvenum multitudo ad illorum scholas concurreret, quibus rebus tantam erant auctoritatem consecuti, ut de gravissimis causis qui summam rerum illo tempore tenebant ad eos referrent. Itaque glossatores semper colui, quum nitor et summa in excolendis operibus manus magis videri debeat temporibus quam ipais defuisse, ut veteris quæ dicitur scholæ picturas magni habeo, etsi nunc eadem res adcuratius ad artes regulas pingi potest."³

¹ Pansierolus, *De Clar. Leg. Interpret.*, p. 408.

² Terrasson, *Hist. de la Jurispr. Rom.*, p. 408.

³ Haenel *Dissensiones Dominorum*, p. iii. iv.

These observations agree with those of Savigny, and Haenel has not shown himself less zealous and laborious in giving valuable proofs of his respect for the glossators than that eminent historian. Haenel has enriched the literature of the Civil Law with an elaborate edition of four ancient collections of "Dissensiones Dominorum," or "Controversies of the Doctors," (three of which had never been printed before) illustrated by very learned notes.

Those collections contain concise statements of the points which were controverted amongst glossators, with the different opinions thereon, and the laws referred to in support of each. Several very complete indexes render that mass of information easy of reference, and the notes of the editor give the *variae lectiones* in the different MSS. and also references to authorities.

We need not enlarge on the value of such a work, which is sufficiently obvious, but something must be said touching its practical use. There are not many cases in which in these days any reference to the glossators is requisite or useful, — because they are superseded by Cujacius and the school of the *erudita jurisprudentia* of which he was the illustrious head. But cases sometimes occur in which the accurate and profound investigation of texts of Law is required on the meaning and effect of which the modern commentators differ. In those cases the wonderful acuteness and subtilty of the ancient glossators afford powerful assistance, more especially as the conclusions of the later authorities are in many instances to be traced up to them; and many of their opinions have been handed down and are followed in the Courts. Now it is evident that the examination of those sources of legal doctrines would be incomplete, without means of knowing how the glossators differed among themselves on the matters in question, in order that the judge may have before him the several opinions of the ancient sages on the point which he has to decide.

The conflict of authorities cannot generate doubt unless the judge is incompetent; that is to say, it cannot render the task of deciding more difficult. If those opinions were binding on the judge they would embarrass him, but he is

not bound to follow them. He has only to attend to them as advisers.

Thus we find that the use of the ancient glossators and of the gloss of Accursius is brought within a narrow compass, and that where those authorities are resorted to they are by no means unmanageable. The gloss of Accursius (which, as our readers are aware, is printed in the margin of the old editions of the *Corpus Juris*) is in most cases sufficient without the assistance of the older glossators, to explain the meaning of a text, and to show what points may arise upon it. In case of doubt, however, it is well worth while to consult the "*Dissensiones Dominorum*," in order to see what opinions they held thereon, but without any servile adherence to the views of any particular doctor. Where, then, is that confused and bewildering mass of glosses with which the common lawyers reproach us? But let us resume our sketch of the history of the Doctors. Savigny gives the following account of the ancient writers who lived after the middle of the 13th century.

"A partir du milieu du treizième siècle, le caractère scientifique de l'école des glossateurs s'efface complètement, et une ère nouvelle commence pour la jurisprudence. Le défaut capital des jurisprudences de cette époque est une prolixité rebutante, qui trahit la pauvreté des idées ou l'impuissance de les rendre, et ôte à leurs écrits le peu d'utilité qu'ils pourraient avoir; ce qui les met surtout bien au-dessus des anciens glossateurs, c'est le petit nombre et le peu de valeur de leurs compositions écrites. Autrefois les professeurs faisaient des leçons élémentaires pour leurs élèves, et des traités approfondis destinés aux jurisconsultes. Mais à l'époque où nous allons entrer, le nombre des compositions écrites diminue tous les jours, et elles perdent leur importance sans que l'enseignement y gagne rien. Pour s'en convaincre, il suffit de comparer les leçons d'Azo et celles d'Odofredus par exemple. Azo tout en aidant l'intelligence de ses élèves, compte sur elle et lui laisse quelque chose à faire: Odofredus au contraire entre dans une multitude de détails qui accablent l'esprit de ses élèves et leur fait perdre le texte de vue. Cette différence vient de ce qu'Azo dans ses ouvrages était accoutumé à s'adresser à des lecteurs instruits; tandis qu'Odofredus, parlant toujours à des étudiants, se

place à leur niveau, et leur ôte ainsi le résultat le plus important de tout étude, l'exercice donné à l'intelligence."¹

Thus the *jurisconsulti* of the middle of the thirteenth century were mere text writers, without genius and originality. They went on with sterile and pedantic industry, amplifying what had been said before them. If this state of decadence had continued, the school of the glossators would have remained insulated, and would not have exercised a beneficial influence on modern jurisprudence. But in the fourteenth century, the Civil Law revived; not so bright and active as in the days of the glossators, but sufficiently powerful to transmit legal science through an uninterrupted succession of *jurisconsults*, down to the epoch of the restoration of letters.

The doctors of the fourteenth century, however, were placed under the influence of very unfavourable circumstances; and their works are not exempt from the defects of those who immediately preceded them. The glossators had been singularly favoured by political events. The constitution of the new republics and the government of corporate bodies called for the development of legal science, and insured to its cultivators an honourable and important part in public affairs. In the fourteenth century the aspect of political events was different. The constant alternation of despotism and licence; the oppression of the nobility by the democracy, which was in its turn sometimes punished by cruel tyranny; and the constant strife of factions, had a most injurious effect on the Law and the civilians.² Their rank, their influence, and their independence alike suffered from these causes.

Savigny also attributes a prejudicial effect to the forms of dialectics, which the civilians adopted at about this time. No doubt (he observes) logic is indispensable in every part of legal science; but it often happened that, attaching too much importance to the forms of dialectics, the origin of principles was forgotten in the midst of divisions and subdivisions, distinctions and subdistinctions, amplifications and limitations; and thus the sense and reality of the Law were lost sight of.

¹ Savigny Hist., vol. iv. p. 162.

² Ibid. vol. iv. pp. 198, 199.

But the greatest direct cause of the deterioration of the science of Civil Law was that the gloss became the basis of teaching and study instead of the text. No doubt the glosses would have assisted the study of the Law; but being regarded as the end, and not the means of study, they became an obstacle to the knowledge of the text; and this evil went on augmenting, for the works of Cinus, Bartolus, and Baldus were added to the gloss, and soon formed an insurmountable mass. This abuse was rendered worse by the habit of reckoning the number of authorities in favour of a given opinion. Against such a method they might have found a caution in the *Corpus Juris*, where Justinian says to his commissioners, "Neque ex multitudine auctorum quod melius est et æquius judicatote, cum possit unius forsitan et deterioris sententia et multas et majores in aliqua parte superare."¹ But, regardless of this solid and wise precept, they heaped up citations on citations, losing all originality, and mechanically following their predecessors.

In the midst of this defective state of the Law, a very advantageous effect seems to have been produced by actual practice, which prevented the reality of law from being lost, and brought a remedy to the pernicious action of dialectical formalism.²

This happy influence of practice is attested by history. The two civilians of that period who have most advanced the science of Law — Cinus and Bartolus — had passed a great part of their laborious lives in the toils of the legal profession, and the book which is most exempt from the defects of the times was written by Lucas de Penna, a practising advocate, who had nothing to do with teaching.³

The part which the civilians now took in the practice of affairs was, however, much changed. The ancient glossators were called by the constitution of the state to public and judicial functions. In the fourteenth century the doctors preferred devoting their time to delivering opinions, and this species of labour occupied the greater part of their lives, and was the chief source of their wealth and reputation.

¹ *Constit. Deo Auctore*, s. 6.

² Savigny *Hist.*, vol. iv. pp. 205, 206.

³ *Ibid.* p. 206.

Their opinions, indeed, had the greatest influence on public affairs,—for example, on the disputes between the Emperors and the Popes and Antipopes.¹

We will now add to these general observations a sketch of the most remarkable men among the doctors of this period of the history of the Civil Law.

The first in order is Cinus, who was born at Pistoga, in the year 1270 — of the noble house of the Siniballi. This eminent person was not only a great lawyer, but a poet, and the friend of Dante and Petrarch, and Boccaccio is said to have studied Law under him. But his literary tastes and his romantic attachment to Selvaggia Bergolesi did not prevent his holding high and important judicial offices.² His great work is his reading on the code — “*Lectura in Codicem*,” of which Savigny gives the following character.

“Son commentaire se distingue par une intelligence pratique, indépendante de la routine des écoles, et une originalité de pensée que l’on ne trouve en aucun commentaire depuis Accurse. Ce mérite s’explique par les circonstances particulières de la vie de Cinus, qui à l’âge où mourut Bartole n’avait pas encore professé, et avait agrandi le cercle de ses connaissances par ses voyages et par le maniement des affaires politiques, et judiciaires. Cinus comme plusieurs de ses contemporains, n’était pas étranger à la littérature classique, mais seul des jurisconsultes de son temps il cite à l’appui de ses opinions les statuts des différents peuples, et la pratique des tribunaux. Cinus s’élève souvent contre l’usage abusif des *Brocarda*, et rien ne prouve mieux l’indépendance de son jugement, et la justesse de son esprit.”³

Panzirolus informs us that Cinus despised the Canon Law and made himself very obnoxious to its professors.⁴ This was probably a prejudice arising from his Gibelline opinions.

We shall continue this account in our next Number.

¹ Savigny, Hist., vol. iv. p. 208.

² It is rather curious, that though his poetry is full of the most romantic and refined love, we find in his comment on L. in. Cod. *De mulier quæ se propriis servis*, this passage “*Crede experto, quod donum magis valet quam suspirium, imo suspirium nihil valet sine dono. . . .*” But perhaps he wrote in a moment of disappointment.

³ Savigny, Hist., vol. iv. p. 215.

⁴ Panzirol, de Clar. Leg. Interpr. p. 144.

ART. VI. — THE HISTORY OF THE LAW AMENDMENT SOCIETY FROM ITS INSTITUTION, IN 1844, TILL THE PRESENT TIME.

SECT. IV.¹ *Of the Suggestions and Resolutions of the Committees and Meetings with reference to the Law of Property; together with some account of the results of those labours.*

JOHN A'NOKES and Tom A'Stiles have some time since retired from the student's Vade Mecum. Our old friends John Doe and Richard Roe have received notice, in good earnest, to quit the possession of tenements, of which they have shown themselves to be such treacherous guardians. Fair Title, Good Title, and all titled persons of that stamp, share the same fate in the new process of ejectment, which is to succeed that in which they have so long been the *actores fabulæ*. But we must take leave, for our own special convenience, to retain in this place, the equally ancient cognomina of "Green Acre" and "Black Acre," in order to give a general illustration of the matters which we have in hand.

A very noticeable project of amendment respecting Real Property was brought forward soon after the Society had been organised, in the following terms:—"To consider the propriety of merging all attendant terms, reserving the benefit thereof to the existing and future owners of the fee on which they are attendant." A mysterious announcement for consideration to the uninitiated, and, indeed, to some of the *savans* themselves; but of no small import in its rights, as will presently be shown. If John Smith were to marry Ann Thompson, Anne Thompson being the owner of Green Acre or Black Acre, in fee, and the plan of settlement were that the husband and wife should have the profits of the estate for their joint lives, and then that their children should share, a term of years 100, 500, or 1000, would be created. If the husband were to die, perhaps the wife might marry again; and, there being no children of the first marriage, the question would be, what should become of the estate if the wife

¹ See Sect. I. printed 18 L. R. 59.; Sect. II. ib. 304.; Sect. III. ib. 311.

should die intestate, living the second husband. The wife's heir-at-law would, of course, be entitled; but unless the term of 1000 years could be got at, there would be but a shadow of an inheritance, and no marketable title. Now, in this case, the law is, that the term (to use the legal phrase), attends the inheritance. In fact, it protects the inheritance from any claim of Anne Thompson's second husband, who, being his wife's administrator, would otherwise become owner of the estate, by virtue of this very term of 1000 years. It is easy to conceive from hence, that many complications may occur in families to make it desirable that terms of this description should be carved out of the freehold. It is easy to create them; but when their purposes are accomplished, the diligence or knowledge necessary to prevent them from becoming mischievous and embarrassing, is not always present. Therefore it has happened that, in process of time, very numerous estates are found encumbered or infested with these outstanding terms, many of them being satisfied; that is to say, having fulfilled the object for which they were brought into existence. As between the owner of the inheritance and the party entitled to the term, or his personal representative, the matter might only be productive of a troublesome litigation, ending almost invariably in favour of the proprietor of the freehold, but as between a vendor and a purchaser, the presence of such outstanding terms was frequently a serious source of disagreement and annoyance. The members of the Society who were conversant with this subject did not fail to observe that, to use the example above quoted, if they could recommend the extinction by statute of such a term as that granted by Anne Thompson as far as its trusts were satisfied or performed, they would render a valuable service to the landed interest. An Act passed on the 8th of August 1845, testifies to their exertions. For, on that day it was ordained that, upon the 31st of the following December, satisfied terms attendant on the inheritance should cease; and, likewise, that terms becoming satisfied after the 31st of that month should likewise determine upon their becoming attendant on the inheritance. But inasmuch as a person buying land without notice of a mortgage is protected by obtain-

ing the assignment to himself of a prior outstanding term, the Act throws a shield over such a purchaser, by giving him the same benefit with reference to terms satisfied on the 31st of December 1845, as he would have had if there had been no extinction of them by the Legislature.¹ And it is not a little curious, although we by no means vouch for more than a coincidence, that at the meeting next after the reference to the Committee of this matter, several noblemen of large landed possessions enrolled themselves (and not without high praise of the Society) in the list of membership.

And now that we are engaged in difficult portions of our legal history, we will just dispose of the doctrines of *Scintilla juris*, springing and shifting uses, the operations of the Statute of Uses, of limitations depending upon a possibility on a possibility, and the distinction between a gift *per verba de præsentibus* and *per verba de futuro*. The public are more interested in the endeavours of a Committee to simplify these strange effects of our settlement and testamentary law than they are aware. Not that the *Scintilla juris* (spark of right) is of much signification. If John Brown conveys Blackacre to Thomas Smith for family purposes and uses; as, for instance, to make an insurance in favour of his children, some one is supposed to be seised to the use of the children. Some have said that Thomas Smith could not be so seised, because the Statute of Uses transfers the use into possession; and, in that view, *he* could not be so seised. Others said, that John Brown could not be deemed to have the right seisin, because *he* had nothing in the land; for, if he came upon the land, he would be a trespasser on the feoffees: *i. e.*, on the persons to whom Brown had conveyed Blackacre. Therefore it was agreed, that as soon as John Brown's eldest son should be born, the feoffees should have the power to awake the sleeping use by entry on the lands, and thus that they had a possibility of entry, and, consequently, an interest or title, and not a naked authority; and this was *Scintilla juris*.

We now come to a possibility upon a possibility. Certainly an owner of land has a moral right to leave his pro-

¹ 8 & 9 Vict. c. 112.

perty to John Brown, with remainder to George of John Brown, although no such infant as may have been then born. But the Law at juncture and annuls the gift; because, 1st. might not have a son; and secondly, the name might not be George; or, in other words, John truly have *a son*, that would be one possibility might be George, that would be the second possibility nevertheless, a possibility upon a possibility Law will not lend its sanction.

Springing uses are merely such as are to future. As if John Brown should convey land the uses of them to be for himself, and to such as he might happen to marry. As soon as he takes a wife the springing use arises. So, if he should convey an estate for the use of himself but should declare the time to commence four years after his decease, this would be a springing use. If the owner were to make an arrangement, that one of his heirs should have the land for his use, upon condition that he should pay a certain sum of money within a year, in default, that the estate should go to some other person and his heirs; this would be a *shifting* use. If he were to have the land, in like manner, upon condition that he should pay Smith a sum of money, say 100*l*. If the land were to enure to Lloyd's use, this would be a use in favour of Lloyd.

The Latinisms of "*Verba de præsenti,*" and "*de futuro,*" with reference to Gifts of Estates, are now under discussion. We copy the following illustration from Mr. Fearne:—"The testator devised his estate to his son A., and his heirs, executors, and administrators, to trustees, and their heirs, executors, and administrators, to pay an annuity to his son B., and after the death of A. to pay one moiety thereof to such children as he should have and their heirs, and another moiety to the [first] son of his grandson C. . . ." The testator having had children, B. died, but C. had no children, being very young. C. however s

¹ This word "future" should be omitted.

children, but it was contended as against the right of these children, that the estate in the trustees was determined at B.'s death, so that C.'s children could not take that which had never existed. The Court decided in favour of C.'s children, but our concern is with the different forms of the words. Here the gift to *C.'s children* was "*Per verba de præsenti*," being mentioned as a person in present existence, for the word "*future*" had crept by mistake into the text which we have quoted. But if Brown devises to Smith for fifteen years, and then gives the remainder to the first son of Lloyd, these are "*Verba de futuro*;" inasmuch as the first son of Lloyd was evidently mentioned as a person not at the time in existence. These differences, which involve very intricate points of conveyancing, are thought by some members of the Society to be capable of reconciliation or of abolition.¹

Uses and trusts were formerly synonymous. If any one wished to avoid the crushing operation of the Statutes of Mortmain, he got his patron or benefactor to convey the estate to some other person, but nevertheless, that the other person should be seised to the *use* of the parties (usually ecclesiastical) to be benefited. Then came the Statute of Uses transferring the legal seisin or possession to the use. Hence it would happen, that the Statutes of Mortmain were put in action to prevent public bodies from acquiring property with the same facility as before. But the Judges of that day held, that some uses did not come within the statute so as to transfer the possession, so that such uses remained distinct from the legal estate. And these were taken under the wing of the Court of Chancery, being supported under the name of trusts. A trust was consequently considered to be a use not executed by the statute. It is not necessary to pursue these matters further, for it is evident that trusts have survived for a Court of Equity by

¹ See the Report of the Society on the Law of Uses and Trusts, where the assimilation of Legal and Equitable Interests is recommended.

Contingent Remainders and tortious Conveyances were attempted to be abolished in 1844, the year in which the Society was formed; but it became necessary to have a new Act in 1845 (8 & 9 Vict. c. 106.), and the assistance of its members was, doubtless, found valuable.

reason of the infirm judicial construction put upon of Uses. In carrying their searches into the registry the Society did not fail to bear in mind the temptations of trustees. They had also before their eyes the grievous breaches of trust committed or suffered by those whose property had been made the subject of the bill. Women, of kind nature, easily persuaded by the obnoxiousness of this legal misfortune. And at the same time their knowledge of business, figure sometimes malefactors in these matters.

We must not be surprised to find that consideration has been paid to this branch of improvement more than once. More than one Report has been the result of the Committee's labours. At one time it occurred to the Committee that Trusts might be erected, but the project was abandoned on account of the expense. They then turned to the appointment of an Official Trustee, and concluded that such a functionary might, with the aid of officers, perform the required service. They nominated the Lord Chancellor as Official Trustee, and suggested two classes of officers who should do the active work: the Commissioners of Bankruptcy in London and the "Local Administrators" giving ample security of integrity and good conduct. As the name of "Trustee" is not pleasant, the Committee recommended that the Commissioners should, while engaged in these duties, assume the title for that of "Commissioners of Trusts." If the Commissioners would undertake the judicial and administrative portion of the scheme, the working portion of the scheme, admitting of no qualification, would be, that there should be no compulsion on the part of the public: they should prefer the old plan of private trusteeship should they wish to continue their predilection; such as should be required upon the new arrangement might have a place in the execution of their deeds and wills. It is not proposed at present to interfere with the property of intestates, but to confine the new arrangement at first to trustees and executors.¹

¹ The more simply this, in common with all remedial measures, is worked, the more beneficial it would become. It might not a

In closing our remarks upon this subject, we are convinced that we do no more than justice to it when we say, that the people at large have no adequate idea of the amount of property which is involved in trusts. Nor do they always calculate with clearness the periods which frequently elapse before a violation of trust is disclosed and measures are taken to compel restitution. The language of the original reference best describes the intentions of the Society. "To consider the expediency of establishing a Court of Trusts, with a view to creating a system of public trusts; so that a person making a will, or executing a deed for the settlement of property, should not be driven to the necessity now existing of appointing private persons to be executors of the one or trustees of the other."

A report of the Society, moreover, recommended the vesting of trust property in trustees, by virtue of their "appointment, without conveyance." This proposal was carried into effect by the statute 13 & 14 Vict. c. 60. s. 34. And again, another Report having recommended "the facilitating the appointment of new trustees where the existing power for that purpose [was] imperfect;" the same act of Vict. (s. 32. *et seq.*) carried this suggestion likewise into effect.

We now come to the mode of transferring property without regard, *in the first instance*, to any particular kind of limitation, settlement, or distribution. Personal property in the public funds is of easy transfer. Deeds and wills direct how it shall be appropriated. Undoubtedly this incident of transfer is one of the most, perhaps the most, important and remarkable matters of business which can engage the attention of a modern jurist and practitioner. Without impeaching the conduct or dealings of present conveyancers, whether at the Bar or below it, there is a strong suspicion on the part

Commissioner's Court into a little Court of Chancery. The fewer officers the less complicated the machinery. It would be a sad error to find the suitor inclining to the dilatory and expensive stages of the Court of Chancery by reason of some oversight in the new system. And it might be prudent to hesitate before any powers should be confided to Masters Extraordinary of that Court. The proposal is in itself simple and promising, and, in order to success, needs only the support of its own equity.

of society at large that frauds may be practised
culty; that technical doubts are often suffered
titles which ought to be at once marketable; th
judicial and private, are seriously and unneces
upon the suitor; that little properties are abs
able for want of means to satisfy the cravings
cated machinery;—we say that such a feeling
to warrant the most patient but resolute inve
to call not only for opinion but action. Yet,
ing the labours of Committees, and the Repor
Property Commissioners, and, we may add, th
gestions of private persons unconnected with a
so difficult is the question, that no satisfactory
been hitherto arrived at; and, at the same tim
imperious is the desire and the need of change
and embarrassments of the case are still sub
resignation. In a word, *adhuc sub judice lis e*
plans for ameliorating the condition of our lan
seem agreed that a Registry is necessary — n
gistry as exists in Middlesex and Yorkshire, wh
to be imperfect; but the *principle* of a registry
be the correct mode of beginning the reform
seems, also, to be a strong opinion that a cent
be established, where deeds may be register
corded. The expediency of subordinate or
appears to be reserved for future decision.

The Society has gone elaborately into the
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favourable to its adoption. Admitting the p
gistry, it may be mooted whether the instru
registered *at length*, or by memorials. It wa
the *whole* instrument should be placed upon
then asked, whether the originals, or copies, s
sited. It was resolved in favour of deposit
The idea of registering several deeds natur
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persons, the names of parishes, the names of
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Thus we find that the use of the ancient glossators and of the gloss of Accursius is brought within a narrow compass, and that where those authorities are resorted to they are by no means unmanageable. The gloss of Accursius (which, as our readers are aware, is printed in the margin of the old editions of the *Corpus Juris*) is in most cases sufficient without the assistance of the older glossators, to explain the meaning of a text, and to show what points may arise upon it. In case of doubt, however, it is well worth while to consult the "*Dissensiones Dominorum*," in order to see what opinions they held thereon, but without any servile adherence to the views of any particular doctor. Where, then, is that confused and bewildering mass of glosses with which the common lawyers reproach us? But let us resume our sketch of the history of the Doctors. Savigny gives the following account of the ancient writers who lived after the middle of the 13th century.

"A partir du milieu du treizième siècle, le caractère scientifique de l'école des glossateurs s'efface complètement, et une ère nouvelle commence pour la jurisprudence. Le défaut capital des jurisprudences de cette époque est une prolixité rebutante, qui trahit la pauvreté des idées ou l'impuissance de les rendre, et ôte à leurs écrits le peu d'utilité qu'ils pourraient avoir; ce qui les met surtout bien au-dessus des anciens glossateurs, c'est le petit nombre et le peu de valeur de leurs compositions écrites. Autrefois les professeurs faisaient des leçons élémentaires pour leurs élèves, et des traités approfondis destinés aux jurisconsultes. Mais à l'époque où nous allons entrer, le nombre des compositions écrites diminue tous les jours, et elles perdent leur importance sans que l'enseignement y gagne rien. Pour s'en convaincre, il suffit de comparer les leçons d'Azo et celles d'Odofredus par exemple. Azo tout en aidant l'intelligence de ses élèves, compte sur elle et lui laisse quelque chose à faire: Odofredus au contraire entre dans une multitude de détails qui accablent l'esprit de ses élèves et leur fait perdre le texte de vue. Cette différence vient de ce qu'Azo dans ses ouvrages était accoutumé à s'adresser à des lecteurs instruits; tandis qu'Odofredus, parlant toujours à des étudiants, se

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Thus the jurisconsulti of the middle of the thirteenth century were mere text writers, without genius and originality. They went on with sterile and pedantic industry, amplifying what had been said before them. If this state of decadence had continued, the school of the glossators would have remained insulated, and would not have exercised a beneficial influence on modern jurisprudence. But in the fourteenth century, the Civil Law revived; not so bright and active as in the days of the glossators, but sufficiently powerful to transmit legal science through an uninterrupted succession of jurisconsults, down to the epoch of the restoration of letters.

The doctors of the fourteenth century, however, were placed under the influence of very unfavourable circumstances; and their works are not exempt from the defects of those who immediately preceded them. The glossators had been singularly favoured by political events. The constitution of the new republics and the government of corporate bodies called for the development of legal science, and insured to its cultivators an honourable and important part in public affairs. In the fourteenth century the aspect of political events was different. The constant alternation of despotism and licence; the oppression of the nobility by the democracy, which was in its turn sometimes punished by cruel tyranny; and the constant strife of factions, had a most injurious effect on the Law and the civilians.² Their rank, their influence, and their independence alike suffered from these causes.

Savigny also attributes a prejudicial effect to the forms of dialectics, which the civilians adopted at about this time. No doubt (he observes) logic is indispensable in every part of legal science; but it often happened that, attaching too much importance to the forms of dialectics, the origin of principles was forgotten in the midst of divisions and subdivisions, distinctions and subdistinctions, amplifications and limitations; and thus the sense and reality of the Law were lost sight of.

¹ Savigny Hist., vol. iv. p. 162.

² Ibid. vol. iv. pp. 198, 199.

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¹ Savigny Hist., vol. iv. p. 162.

² Ibid. vol. iv. pp. 198, 199.

schedule of this Act. The first column has a few words to express a *covenant* (to take an instance), whilst the second column gives the much longer form of expression commonly used, and the statute itself declares that the simple statement shall have all the force of the verbose or longer description. The words, "free from all incumbrances," represent fifteen lines of the old conveyancing, and the words, "and the said [releasor] releases to the said [releasee] all his claims upon the said lands," were intended by the Act as a substitute for at least twenty-two. But these short expressions, "and the said [covenantor] covenants with the said [covenantee], that he will execute such further assurances of the said lands as may be requisite," represent nearly a page of the ancient stuff.¹ A similar abridgment has been essayed by an Act "to facilitate the granting of certain leases."²

Intestacy is often declaimed against as a remarkable omission on the part of an owner of property. If it were censured as an extremely unwise negligence, the observation might probably be more correct. The dread of death, the enticements of delay, the incertitude of arrangements, want of confidence, a busy life, ignorance of legal consequences, — these and other incidents may be the causes of the misery and expense which are apt to await the relations of such as die without a will. The eccentricity of the neglect is negatived by its frequency; whilst, on the other hand, the evils of intestacy are not the less immediate, nor the injuries less certain. The Court of Chancery, into which many of these

¹ This is evidently a most praiseworthy and valuable statute, and it might be the foundation of many others, but that a way has been found to elude it by inserting all the ancient verbiage, in the first instance, subject, nevertheless, to its immediate withdrawal upon objection.

² 8 & 9 Vict. c. 124. Take as example with reference to "Repair." Instead of, "And also will, during the said term, well and sufficiently repair, maintain, pave, empty, cleanse, amend, and keep the said demised premises, with the appurtenances, in good and substantial repair, together with all chimney pieces, windows, doors, fastenings, waterclosets, cisterns, partitions, fixed presses, shelves, pipes, pumps, pales, rails, locks and keys, and all other fixtures and things which at any time during the said term shall be erected and made, when where, and so often as need shall be," the simple words, "and to repair," shall suffice.

deserted estates are thrown, is seldom so faithful of them as an undisputed owner possessed under of a legitimate testament. Indeed, the management by that Court has been deemed worthy of mention and Report by an Equity Committee of the House of Commons. It is, therefore, not surprising that this improvement should have attracted particular attention; and, we find that early consideration was bestowed on its merits.

It may be said, that when persons are so careless of consequences as to leave no evidence of their wishes at death, it cannot be expected that the law will take pains to ascertain the nature of such wishes. Yet it is to be recollected, that intestates are entitled to consideration, that the creditors should have a share of attention, that the law should take the trouble of administering their effects and give some indemnity, and that a delay of justice in the equitable distribution of the property left behind, as well to the parties interested as to society, standing the apathy, we may sometimes say, of those who refrain from making a will, the loss ever occurred to them would be that of death to tradesmen or correspondents; if in their lives they were coldly on their kinsmen, they would never have a posthumous insolvency. They might well have foreseen, that their means were ample to cover their expenses, and that, should a sudden stroke remove them, there would be residue enough to satisfy all just demands. They had not calculated on the absorbing functions of Chancery. They had not appreciated the duties of an administrator. They had not credited the likelihood of relations, the readiness of the law to foster a dispute, and the slowness of its ministers to extinguish a fire once kindled. Still more remote would have been nearly all their assets might be swallowed up in the costs for justice, and that even the remnant of 35 per cent capital might, at the winding up, coexist with

¹ See the Report.

Yet far more extravagant cases than this have happened, and the evil is still rife; men die daily without a testament, the Court of Chancery is in permanence as far as their matters are concerned, and "3000*l.* may again be realised by the representatives of an intestate *without any division whatever being made.*"

If the opinions of the Society were to weigh in this instance, a state of things so unreasonable, so oppressive, and so mischievous, would have but a brief continuance. Viewing the question in the light that, after death, all things ought to be upon an equality. All creditors, according to these opinions, would be placed upon the same footing. Again, it should not be in the power of any clever practitioner to aid his equally precocious client in hurrying on a suit against the representatives to the exclusion of others as well entitled but wanting in such prompt activity. A certain time should be suffered to elapse from the period of the debtor's demise to enable all parties to look around them, and to consider what demands should be pressed on the one hand, and what payments made on the other. Actions at law indeed no longer abate¹, but now continue as against the personal representatives. A rateable distribution of assets should be made, by periodical divisions, among creditors. Then, for a defence against false claims, the personal representative might require such claims to be verified by statutory declarations. And on the other side, the administrator or representative might be required to produce a statement of account, and a plea, verified by affidavit, that he had fully administered all the effects of his testator or intestate as far as they had come to his hands.

Another important suggestion may be readily conceived. It seems hard that, after the due distribution of the property, a liability, unknown and dormant for years, should intrude itself, and invade with success, not the original fund, for that is gone; not the legacies, for they are not easily to be reached after payment; but the estate of the representative himself,—of the very person who has had all the anxiety of the settlement, together with its barrenness of recompense. So ruth-

¹ 15 & 16 Vict. c. 76, s. 135. et seq.

less a calamity could scarcely be overlooked, here observe that executors as well as administrators profit by the safeguards above mentioned, although the expenses and hazards of administration are, in no more formidable than those of an executorship. I put up for a moment the case of the executor, in reference to this point of future liability. The methods of conducting a will to its final issue, is to confide the affairs of the testator to a solicitor, the contents of the instrument be not very complex in general, pass his client through the ordeal of litigation with tolerable security. But if there are difficulties, not of quick solution, the matter is referred to Chancery," the executor reposes all his cares in the hands of the legatees linger in long expectation, the co-heirs are technically called, "out of the estate," and the estate is then distributed, minus such a percentage as the executor is astonished the giver had he been alive to have made disposition of his savings. There is one other class of persons whose numbers are limited. It is composed of certain persons (not lawyers) who are fond of intermeddling in the affairs which may give them occupation. I call them the attorney, and enter upon their bold career with a spirit not unworthy of their cause. And indeed, by dint of briskness and bustle they clear themselves of their perils and withdraw from the scene of credit to themselves and benefit to their beneficiaries named in the will. But it is not always thus. Frequently an occurrence as unforeseen as embarrassing to a discontented legatee or creditor files a bill against the executor finds himself in full verification of

"He who will ride on Blackstone edge
May chance to get a fall."

He is consigned to Chancery with all his misadventures on his head, and, whatever his deserts (sometimes they are very great), he may not escape without having paid the uttermost farthing. In truth, the Court of Chancery has been pleased to make a favourable disposition in respect to such as pass their accounts through

crucible. Without the pale of that Court giants and dragons await the adventurous traveller; within, if he is devoured at last, he perishes at least by an equitable death. So tender is Equity towards the executor who seeks shelter beneath its auspices, that, although the executor be wrong, yet he shall have his costs for his timely confidence. In vain will the legatees exclaim that the estate is gone, the proceeds swallowed up, the little pittance exhausted, and, which is more grave, that *the executor is wrong in the main point*; the hardship on the executor's side is recognised, and whilst the property melts away in the arms of justice, the legatee receives his meed of pity, and the executor his complimentary quietus. It is from hence evident, that if a man be bold enough to act independently of the Court, he does it at his own imminent hazard in cases of dispute; if he enters into that protecting fold, the poor suitors who are interested in the surplus must bide not merely their time, but their risk likewise.¹

But there is another light upon the subject, which concerns not only the executor who works without, but him also who works with, an attorney. It is true that a lawyer, from habits of scrutiny, is more likely than the private man to discover a hidden liability; but there are upon occasions shades of darkness which the most acute eye cannot penetrate, and against which there will be no relief. A prudent person, entrusted with the office of managing assets under a will, employs an attorney. The distribution is made in all harmony, the trusts of the will are arranged, and the considerate lawyer conceives, not without reason, that the enormous expenditure of a Chancery account may for once be dispensed with. Time rolls on, till at length, seven years after the decease of the testator, the executors become aware, for the first time, of the existence of a trust seriously affecting the course of administration, which they had deemed to have been so successfully closed. And they are soon acquainted not only with the trust, but with breaches of that trust committed by their testator twenty years before his death, and thirty years before the facts came to their know-

¹ Nevertheless, an instalment for good has been made in the case of administration. See 15 & 16 Vict. c. 86. ss. 42—47.

ledge. To proceed, they are informed that a suit is instituted for the purpose of placing them, in regard of this debt of their testator, in the same position as though no settlement of the effects had been accomplished. In other words, they are requested to pay over the sums deficient in the trust to the persons lawfully entitled. The estate being dispersed, the executors naturally view this demand as one of immeasurable injustice. They defend the suit, and, like honest men, admit the receipt of monies from the fund of the testator equivalent to those due upon the breaches, but allege that they never heard of the trust till seven years after the death of their principal. Vain remonstrance! They are charged with the *full liability and the costs*. And, there being no property to answer the judgment, the decree against them is personal.

Doubtless they might go round to the legatees and desire a proportionate recouping or refunding; but being sensible how much more easy it was to pay than to obtain restoration, and calculating that one Chancery suit might be exchanged for six, they probably retire from the uncertain speculation with a very indistinct notion of forensic justice. Now the public will naturally cherish any attempt to prevent these visitations. Not that the Judges are chargeable with either the want of equity or of humanity. The system is to blame. Those who administer the laws must adapt their mode of action to the practice and decision which prevail in their Courts. We look to the Legislature for assistance. Surely the popular sanction and thankfulness will combine in favour of the propositions submitted by the Society's Committee, and in whose formation Mr. T. T. à Beckett has had a considerable and honourable share. Is there danger of too hasty a pressure upon representatives? They shall have a time of grace allowed them. Do they stand in peril of allowing irregular priorities of payment? Each creditor shall have an equal claim upon the assets. Do they entertain the reasonable apprehension of future surprise after they have discharged their office? There will be a period fixed, and a brief one by comparison, after which liability will exist no longer. We have already adverted to other improvements upon this head, and we feel assured that the record of such

endeavours to mitigate distress and advance justice will prove an ornamental page in the history of our Law Reformers¹: and it must not be forgotten that the contemplated advantages would arrest the necessity of an appeal to the Court of Chancery by affording a sufficient amount of protection independently of that Court.

The effect of a conviction for felony upon property has been taken into consideration. Its operation with regard to real estate has been much lessened by a mitigating statute², but the forfeiture of goods and chattels still follows an unfavourable verdict of guilty in ordinary cases of felony. It is certainly true that persons possessed of property seldom commit these serious offences, but the subject is, nevertheless, deserving of attention; for whilst, on the one hand, it may be admitted that the Crown may make a wise and merciful distribution of effects, it may, on the other, be urged that it is hard to involve the wife, children, and kindred in the guilt of the parent or relation.

The Law of Property, as far as it relates to married women, has likewise been made the subject of a reference to the Committee on Property. It does not appear that any report has been the fruit of the reference, but the matter is one of some importance, and there are instances on record of great hardship upon affluent ladies, whose wealth has passed, for want of care and equity, into the hands of improvident or unkind husbands. The principle of emancipation may certainly be carried too far, but there can scarcely be any doubt of the ability of the Society's Committee to recommend such a modification of the present law as will throw a shield over the fortunes of the gentler sex, the pride and ornament of our domestic life.

We now come to a very important subject,—Partnership. According to the English law, each member of a firm

¹ See the Reports of the Society, and one in particular, founded upon a reference:—"To consider the Plan of Mr. T. T. à Beckett for the Improvement of the Law relating to Deceased Persons' Estates." There was also a reference:—"To make Real Estate vest in Executors or Administrators to be administered in Equity for those beneficially interested." And likewise one "To make landed Property a Security for Advances of Money."

² 54 Geo. III. c. 145.

is liable for the debts of the concern, although the partners may not be engaged in the management of it, and may not even appear in it, except by their names. This is an unlimited liability of practitioners in our Courts. But the sound doctrine came to be questioned. It occurred to some that the Roman law, in many respects deserving respect, did not regard commercial unions with such strictness as several Continental States a greater latitude to the mercantile community is ever as ready to enforce the fruits of that credit; and that commerce nor industry would suffer by slackening the reins of more liberal observances. It seemed to some that persons who, desirous of reaping a fair return on a loan of their capital, might entrust it to a manager, should find themselves suddenly involved in respect of contracts to which they had never engaged themselves personally as parties. The sanction of law might, indeed, warrant a responsibility, limited to the proportion of their advantages, but ought not to be open to the unbounded speculations of an unwise man or the pruriency of commercial credits. If it was true that they should share in some degree the losses resulting from an injudicious or profligate conduct, it ought not to be amiss to impose some check on those who are too zealous to enlarge their dealings in speculation and adventure. It consequently became a theme for discussion whether the limited system could not be introduced to the benefit into England.

Partnership *en commandite* has been said to consist in an agreement between two partners. . . . where one partner is the other attends in the business." This does not, perhaps, quite come up to the idea of partnership as understood by lawyers, but it contains the substance of it. We draw from it these practical conclusions, — to be a managing firm with dormant partners, or a merchant with capital supplied from sources in the country, or a tradesman in a shop whose goods are sold for another's money, — and that these respect

carrying on the actual business, make all the contracts and engagements belonging to their employment without reference to, and seldom with the knowledge of, the other partners. This is partnership *en commandite*. It is as if one should say, I have so much of my own, but insufficient to verify my wishes as a merchant or trader; if you will lend me as much again, you shall have your proportionate profit, and you will only be liable to the amount of the capital you bring into the firm, or, if you prefer it, to such an amount as you may think fit to notify. In other words, if you advance 1000*l.* you can lose no more than 1000*l.*, provided that you register your liability to that effect: or, supposing you to lend 1000*l.* or 5000*l.*, you may, if you please, declare your willingness to hazard as much as 10,000*l.*, should such an increase be required, receiving, of course, a return in proportion to each respective loan, and your liabilities will then be limited to 10,000*l.*

This is partnership *en commandite*, — a system so consonant with common sense that a majority of the Committee of the Society appointed to consider the Law of Partnership¹ came, after great deliberation, to a favourable resolution for its adoption. It is true that no agitation has been made by the commercial classes in its favour — that those who receive profits should likewise be amenable to loss — that the employment of capital is not ostensibly restricted by the present unlimited responsibility.

But many able men, as well lawyers as merchants, of the Society are entirely of opinion that the merits of the change preponderate, and they appear not to have given way to several objections which were raised in opposition to the new partnership. As, for instance, amongst others, to the objection that the panics of 1825, and of other subsequent years, might again break in upon us; that legitimate trading would suffer by the assault of rash and reckless speculation; that if any benefit should arise from a change in the law, it would be outweighed by a greater aggregate of commercial, moral,

¹ " More especially with reference to the Liability of Partners in Joint Stock Banks and other Undertakings."

and national evil; that the superiority of our employed capital when compared with that of foreign countries, induces a difference of commercial habits and customs. These and other difficulties which were presented did not cause the opinion of the majority to be shaken; and thus, after an unsurpassed amount of labour on that particular subject, the resolution of the Committee passed in the affirmative.¹

A Committee of the Society has also had before them a reference: "To consider, whether the Compulsory Enfranchisement of Copyholds is desirable, and by what means it can be effected."

The Act for enforcing enfranchisement after the 1st of July 1853, is now in operation, and it will be found that the recommendations of the Committee are greatly in unison with the new statute.²

In ancient times the character of the tenants promised but little for the advancement of agriculture. The landlord was as entirely dominant as the vassal was servient. The lord of the fee was sufficiently absolute to assume to himself the virtue of suffering his acres to be cultivated, and protecting the family of his tenant, rather than acknowledge any relation of equality between them. Hence, whatever was left on the land upon the cession of its occupier, became the property of the lord of the tenement; and, as time went on, this became a matter of increasing importance, inasmuch as the

¹ Common sense seems to require that a man who is unable to control the active agency of a firm unless by withdrawing himself altogether, should not be answerable beyond his embarked capital or self-imposition of further liability. To take from a man 15,000*l.* for the payment of the debts of a managing partner, when the capital of the first-mentioned person amounts to only 1000*l.*, is, apparently, an act very little short of spoliation. The Report of the Commission on this subject is now to be daily expected.

The public may be assured that, in the generality of cases, the creditor deserves greater supervision than the debtor, and that the thirst of gain influences the rise of credits even more than of debts. To recognise partnership *en commandite* would appear to be a return to reasonable principles, to more natural laws, and to a state of security which is essential to a country of free commerce.

² It was referred to the Real Property Committee (Nov. 22. 1852) to report on "The Desirableness of reducing the Law of Real Property to one well-defined System, that of free and common Socage, by the immediate Abolition of all customary and exceptional Laws."

tendency of an industrious man leads towards improvements. Still it seemed so hard that the capital of the working man should go to enrich the receiver of the rent, and the landlord in general was so jealous of his right in this respect, that these beneficial outlays on the part of agriculturists or lessees were by no means common, and the exceptions were frequently visited by a vexatious action and noxious verdict. The Court, however, could not resist unconditionally the demands of sense and justice. In dwelling upon disputes concerning the removal of fixtures, they allowed the tenant to take his cider-mill, and the nurseryman his young trees, whilst they refused to the farmer the privilege of retaining "a carpenter's shop, or pump-house erected for the use of his farm." The merchant and manufacturer had long realised the power of removing the stock or machinery necessary for their particular trades. It remained for the cultivators of the soil to reap, in their turn, the advantages of civilisation, and to participate, as justly they ought, in the better relations which society began to countenance. The principle of improvement guaranteed by the Legislature was carried out in the instance of the Commutation of Tithes. The same principle has prevailed after many struggles in favour of the tenant. In 1851, and not sooner, it was enacted, that if any tenant of a farm or land shall, with his landlord's consent in writing, erect any farm building, detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes, or for the purposes of trade and agriculture, which shall not have been erected or put up in pursuance of some obligation in that behalf; then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removeable by him, notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in any way injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of any thing so removed. However, before the removal, the tenant must give one month's notice in writing of his inten-

tion, and the landlord may then elect to purchase the matters or things proposed to be removed, its value being determined by referees or an umpire. This is not too liberal a boon for the tenant, and yet it is an advancement upon the old law. And the Society for Law Reform may be said to have assured to themselves much honour in consequence of the provisions just mentioned. For their Committees established a patient and searching investigation on the subject, and presented several Reports, in one of which the benefits of the new Act make a conspicuous appearance. Indeed, the final suggestions of the Report recommended a general power of removal of fixtures unfettered by consent on the part of the owner of the land. By a second suggestion they contemplated a new holding, and were of opinion that the Right of Removal should continue as long as possession should be retained. They then exhibited the principle of restoring the farm or premises to the lessor in as good a condition as before the removal. They thought, also, that any presumption of gift to the landlord should be rebutted by a notice of intention to remove; and both these ideas have received the sanction of the Legislature. The section in question concerning fixtures might certainly have been more clearly expressed, especially with reference to new holdings; but, on the whole, the views of the Committee appear to be fairly represented in the statute.¹

This discussion, however, regarding Fixtures, was only a division of the subject referred. Permanent improvement in Tenant Right formed an equal, if not greater, amount of consideration. Drainage, manures, any other importations which may work a lasting benefit to the land, form parcel of this inquiry. Each effort to verify the supposed advantage of awarding compensation to the tenant for improvements of this nature has hitherto failed. And it will be recollected, that we are not writing the history of the law in general, but of

¹ The other portions of this Act relate to the exchange of emblements for a right on the part of the tenant to occupy till the end of the current year of his tenancy; to the liability of growing crops, seized and sold under an execution, to rent accruing due after the seizure and sale, and to the neglect of the tenant to pay rentcharges. (14 & 15 Vict. c. 25.)

the labours of the Law Amendment Society. We have only, therefore, to deal with the answers which their Committee supplied to the main questions connected with the reference of 1848. 1. As to the *compulsory* compensation for an addition to the value of the property; such allowance for improvements being, of course, against the will of the landlord. This passed in the negative. It was concluded, "that the interest of the public, as well as of the owners of the property, is best consulted by leaving the latter to manage and deal with it themselves upon such terms as they believe most conducive to their own interests." But it was added, that, if it could fairly be shown in evidence, that the owners have really an unfair advantage over the occupiers, so as to prevent the latter from being able to make fair conditions for themselves, that the reward for these improvements would be of the highest service to the landlords themselves, and that the power of landlords stands in opposition to the productiveness of land, so as to create injury and loss to the public: the opinion of the Committee might then be in favour of compulsory indemnity.¹

2. "What are improvements for which he [the landlord] ought to pay?" Supposing the improvements to consist of roads, fences, watercourses, drainage, subsoiling, irrigation, lime, marl, and other permanent alterations, guano, chemical salts, and other foreign and artificial manures, the Legislative interference should be specific in respect of them, and there should be one general uniform rate of compensation. In the absence of a Board devoted exclusively to the question, the Committee came to the conclusion that the difficulties of pointing out the specific subjects for compensation must be insurmountable.²

3. Whether an option ought not to be given to the landlord to make the improvements himself? *i. e.*, if the landlord should refuse, then, and not before, the right of the tenant to compensation should arise. This question received an affirmative answer from the Committee. For, while the farmer has the use, the lessor has the property.

¹ See the Report.

² Ibid.

4. "On what principle, and at what period, is of compensation to be determined?" The Report referred to for a minute examination of this question sufficient to say that the Committee looked upon most difficult of solution, and that they were unable to recommend any particular standard of compensation. However, stated the two standards most applicable for the purpose. The first, "The increase in value of the land at the expiration of the tenancy, caused by the improvement." The second, "The prime cost of the works, subject to a proportionate deduction for subsequent enjoyment of the tenant."

5. The fifth inquiry was as to the interval between the two valuations. In cases of difference, the disputes should be settled by the Board. At this point, the Committee referred to the Board of Agriculture, established by the Government in 1793, during the presidency of Sir John Sinclair. The labours of this Board were directed to the arrangement of accurate surveys of any county, to the collection of the local customs between landlord and tenant, and of those between tenant and in-coming tenants. The result of these inquiries was a kind of agricultural code based upon the various customs. "A tabulated compendium of these customs under the title of 'The Practice of Tenancy,' incorporated in the law books relating to the subject of Lord and Tenant, is now recognised and acted upon in many complicated questions at assizes; and forms the sole existing reference on the subject."¹ The Committee went on to observe, that the Board was dissolved, but they pointed to it as the best model of a tripartite character desired, and, to use their own words, "There can be little doubt that it was calculated to accomplish more than it actually did towards satisfying those inquiries, which the present question of Tenant Right may be considered the most prominent illustration."²

6. The last postulate was, How the claim, when established, could be enforced. And, for this purpose, a rent, payable to the tenant, was suggested.

¹ See the Report.

² Ibid

greater than "the amount by which the rent received under a new tenancy exceeds the rent received under the old one." And lastly, "any such alteration," *i. e.*, of the law relating to landlord and tenant, "should be accompanied by an extension of the present law concerning bad husbandry, so as to give the landlord a remedy for all deteriorations in his property caused by the acts or neglect of the tenant, — disputes to be settled as in the case of compensation."

Thus the feeling of the Committee was evidently in favour of an equitable adjustment. But the Society, at their general meeting, approached still nearer to the compulsory system; and in their resolutions passed on the 22d of March, 1848, declared, that it was both just and expedient to admit, and, if possible, to enforce, the existence of the right to compensation. They said that the right would be highly favourable to good agriculture, and that it should be the basis of all agreements upon the subject.

In 1853, the Committee upon the head of Improvement resumed their labours, and, according to their short Report, seem to have come fully into the idea of compulsory compensation. In their proposed resolutions dated June 1853, they lay it down, that whilst the landlord is allowed to have a claim upon his tenant for neglect or bad husbandry, so it is just that the tenant should have a legal claim on his landlord for any increase in the value of the farm caused by the tenant's industry, skill, or expenditure of capital. A special tribunal for the settlement of disputes is then recommended, in order to assess and determine the value of claims to tenant-right, founded, not on written agreement, but on custom.

The period within which such a claim may be made should be limited. Ultimately, the special tribunal, after having been in action for a sufficient time to afford some data and experience in the matter, might advantageously surrender its powers to a Court of Law. The Committee then recommended, that persons possessing a limited interest in land should be enabled to enter into covenants binding on their successors for the purpose of securing compensation to the

tenants, such covenants to receive the sanction of a tribunal, or subsequently, of the Law Courts.

Thus, we see, that compulsory action in order to benefit is in the ascendant; and with this last fact the relations between Landlord and Tenant, we are now to section on Property.¹

ART. VII.—BANKRUPTCY JURISDICTION

TOWARDS the close of our last Number, while discussing the Law Reforms of the next Session, and expressing our hope that the various Commissions of Inquiry issued by the Chancellor, and now in progress, had not been placed under one regulating head, viz., under that of a Minister, we took occasion to advert to the possibility of a failure in consequence of the want of this great desideratum, and after to lament the emanation from those Commissions of several conflicting recommendations; and we expressed our hope, that subsequent reflection on the subject, and attention to what is going forward, instead of increasing our anxiety, has only tended to increase our fears, and has made us more apprehensive than ever of the occurrence of such miscarriage. Most sincerely do we hope that we are mistaken. Most sincerely do we hope that the reforms will prevail on all points: but, in the meanwhile, we must divest ourselves of the apprehensions we enter into, and very grave doubts which beset us; and therefore we have deemed it to be our duty now, and before it is too late, to call the attention of all true law reformers to this important matter.

¹ In the winter of 1852 (Nov. 22.) another reference to the relations of Landlord and Tenant was made. "To report to what Extent Forfeiture of Landlord and Tenant shall be relievable at Law or in Equity."

² This Article must be read as coming from one whose object is to call attention, but not as binding on the conductors of this Review.

Our fears are more particularly excited, and we are more especially alarmed, lest any such conflict as that which we have suggested should arise between the Commission appointed to inquire into the Law of Bankruptcy and that appointed to inquire into the state and practice of the County Courts; and the point upon which we more than any other dread and would deprecate and regret such difference of opinion, is that with regard to Lord Brougham's proposed transfer of Bankruptcy jurisdiction from the District Courts of Bankruptcy to the County Court Judges. We sincerely hope we may be disappointed, and that our fears may turn out to be groundless; and we say so, because, having given the subject much careful consideration, we firmly believe not only that such transfer would be a very great and beneficial reform—would be an important step in the right direction, and one that is, under the circumstances, loudly called for,—but that to persist in keeping up the District Courts of Bankruptcy, after the evidence which has been laid before the Bankruptcy Inquiry Commission regarding them, would, in our opinion, be one of the most gross and flagrant instances of waste of public money that ever was perpetrated in this or any other country.

We have had an opportunity afforded us of reading the evidence taken before both the Bankruptcy Inquiry Commission and before the County Courts Inquiry Commission; and we trust that before either of these Commissions proceed to the consideration of their report, the Commissioners will see fit not only to interchange the evidence which has been taken before each respectively, but that as regards that branch of the inquiry to which we are now more particularly adverting, they will, if they should differ in opinion, also see fit to meet in conference, and by such means endeavour to remove these differences. Nay more; we trust that in the event of any such differences occurring, and its being found impossible by conference to remove them, the Commissioners will even go a step further than this; that with a view to an adjustment they will not hesitate to seek the aid of the high officer who is in fact our Minister of Justice,—namely, the aid of the Lord

Chancellor—an aid which we feel assured would the circumstances, be refused them; and this be and the subject fully weighed and considered by that care and attention which it so eminently deserves only should we hope to see both Commissions in favour of Lord Brougham's proposition for abolishing District Courts of Bankruptcy, but to see that step in advance of this, and recommending the abolition of every one of the Bankruptcy Commissions both in London and in the country, and the ultimate of the entire Bankruptcy jurisdiction to the Court—the transfer of all cases within twenty miles of the Metropolitan Judges—and of all cases beyond that distance to the other Judges.

It is in evidence before the Bankruptcy Commission that the expense of the present Bankruptcy establishment in London and in the country for the year ending 31st December, 1852, for salaries, travelling expenses of Commissioners and Registrars, rent and repair of Court expenses, and remuneration to the Bank of England for keeping its accounts—the current annual expenditure amounted to no less than 66,611*l.* 10*s.* 11*d.*; including the compensations granted to the holders of the offices and to the old London Bankrupt Commissioners under the 1 & 2 Wm. IV. chap. 56., and those granted to the Country Commissioners under the 5 & 6 Vict. chap. 119. the retiring pensions at present payable, it amounts to an enormous sum of 93,277*l.* 13*s.* 0*d.* And it is in evidence, that the excess of expenditure over income for the year amounted to 10,376*l.* 3*s.* 11*d.*, such excess has in several years, been considerable, and having for the year ending 31st December, 1851, been 14,186*l.* 3*s.* 4*d.*

There are in London 5 Commissioners, a Chancellor and 6 other Registrars, an Accountant, an Auditor, and a Master; and in the country there are 12 Commissioners and 12 Registrars. The London Commissioners have 2000*l.* a year each, and the Country Commissioners have 1800*l.* a year each. The Accountant

a year, the Chief Registrar 1200*l.*, and the Taxing Master 1200*l.* The London Registrars have 1000*l.* each, and the Country Registrars 800*l.* each. The Chief Registrar has 5 clerks and a messenger, the salaries of whom amount to 1150*l.* per annum—the Accountant 17 clerks and a messenger, the salaries of whom amount to 5210*l.* per annum—the Taxing Master 2 clerks, at salaries amounting to 450*l.* per annum—and each London Commissioner has an usher at a salary of 100*l.* per annum, and each Country Commissioner an usher at a salary of 80*l.* per annum. And all this is altogether independent of official assignees, messengers, and brokers, who are paid by per-centages and by fees, and who, in round numbers, certainly do not receive among them less than 25,000*l.* a year.

This is a very formidable array—an immense force—and a rather serious amount of annual expenditure; and we apprehend that with reference to it the questions which the Commissioners of Inquiry will have to decide are, whether such an amount of force be required; whether such an amount of expenditure be justified; and whether the business of the Bankruptcy Courts cannot, as suggested by Lord Brougham, be transferred to the County Courts, and be there more conveniently and satisfactorily disposed of, and all this immense establishment, or at least the greater portion of it, abolished, and the expense of it saved to the suitors.

We have called the expense of these Bankruptcy Courts enormous—and it truly is so—for the amount paid in salaries alone, for this one branch of our judicial establishment, pretty closely approximates to the amount of all the salaries of all the Judges of the Common Law Courts of Westminster Hall put together; and if we include the sums paid in compensations and retiring pensions, it actually far exceeds them. Our astonishment is indeed excited at the quietude with which the suitors in bankruptcy have so long borne all this; for be it remembered that every shilling of this expense is defrayed by them, and that not one fraction of it is paid out of the Consolidated Fund. The inquiry, therefore, apart from all other considerations, and looking at it in an entirely money view of the matter, is one which well

deserves the serious attention of the Commissioners, and one as to which, even if there were nothing else to be taken into account, we may very well say we should be extremely sorry to see any miscarriage or conflict of opinion upon.

Lord Brougham, in his District Courts of Bankruptcy Abolition Bill of last Session, proposed to limit the jurisdiction of the Court of Bankruptcy to twenty miles round London, and to give jurisdiction to the County Courts in all cases where the bankrupt resided or carried on business beyond that distance; with power, however, to the creditors, on cause shown to the Chief Commissioner, to have the proceedings carried on at whatever place was most convenient to the general body. His Lordship proposed to retain a Chief Commissioner and two other Commissioners, a Chief Registrar and four other Registrars, and the Accountant and Master, and to abolish the offices of all the other commissioners and registrars as they became vacant, giving power to the Lord Chancellor to appoint such of the commissioners as might be willing to accept, and such of the registrars as might be found to have the required qualification, to be additional Judges of the County Courts.

This was no doubt a large measure of reform, and one well deserving the careful and attentive consideration of Parliament, and his Lordship's proposal has been attended with this good result, namely, that out of it has arisen the two commissions of inquiry on which we are now observing. But, we confess, we never could understand why Lord Brougham stopped short here. We never could comprehend why, upon principle, jurisdiction in matters of bankruptcy should not, *in all cases*, be given to the County Courts; why the Courts of Bankruptcy should not be entirely superseded and the whole of the commissioners altogether abolished. And we are consequently rather pleased to see that a comprehensive plan of this nature has been laid before the Bankruptcy Inquiry Commissioners, and by a gentleman who must of necessity have a very considerable knowledge of the subject; viz., by Mr. Miller, one of the Judges of the Court, and who, going to the full length to which he was desirous of seeing reform carried, makes out, we

to say, a very strong case in favour of his scheme, which, with the arguments in support of it, we will lay before our readers in his own words.

Mr. Miller, after giving the Commissioners of Inquiry his opinions on the several points mentioned in the paper of questions circulated by them, and in answer to the general question of "Whether he suggests, and on what grounds, any, and what amendments of the existing system in bankruptcy other than those already mentioned," says,

"The amendment, or reform, rather, which I have respectfully to submit to the Commissioners of Inquiry, is embodied in the draft bill hereunto annexed. I propose to limit the jurisdiction of the Court of Bankruptcy to a circuit of twenty miles round London; to appoint the metropolitan judges of the County Courts *ex-officio* Commissioners; to abolish the District Courts of Bankruptcy; to give to the judges of the County Courts acting in the country jurisdiction in all cases beyond twenty miles from London; and to abolish the offices of accountant, master, and registrar of meetings, transferring the accountant business to the Bank of England, the duties of the master to the registrars, and the duties of registrar of meetings to the chief registrar. I propose to legislate with a view to the ultimate abolition of the offices of every one of the Commissioners of the Court, and of sixteen out of the present nineteen registrars, besides inferior officers, and the eventual transfer of the entire jurisdiction to the County Court Judges. I would keep prominently in view the tendency of recent legislation, the favour with which the County Courts are regarded by the community, and the great probability there now is that in a very short space of time the mass of the business of the country, both Common Law and Equity, may come to be disposed of there, and the Courts of Westminster Hall be occupied only with great and important causes and the hearing of appeals. I would look forward to a fusion of the various jurisdictions, and to one uniform system of tribunals.

"The grounds on which my proposed Bankruptcy reform is based are:—

"First, the mischief to the community at large, and the inconvenience and expense to creditors, which arises from the distances from the bankrupt's place of residence at which bankruptcies are now prosecuted, and the consequent want of that salutary check to fraud and to reckless trading which would result from the pro-

ceedings being had on the spot, and the creditors having an opportunity afforded them of attending the sittings; and,

“ Second, the very, very absurd extent and expense of the present bankruptcy establishment, in proportion to the amount of work performed.

“ These are the main grounds. The mischief which must result from bankruptcies occurring at Norwich, Yarmouth, Southampton, and some two dozen more distant but large and populous places, being prosecuted in London, and from the same kind of thing prevailing in the District Courts (there being all the while County Courts held at each of these towns, in which the proceedings might easily be instituted and carried on,) is manifest. The creditors give the matter up in disgust; they will not throw good money after bad, by employing an attorney to oppose, or by themselves travelling 60, 80, or 100 miles for the purpose; they cease to care any thing about it; and the consequence is, that the bankrupt walks over the course, and in many cases escapes deserved exposure and punishment; whereas, if the proceedings were prosecuted on the spot, on the scene of the bankrupt's trading, the creditors would take an interest in them, and would make a point of attending, and a salutary check would ensue from the exposures that would take place. But all this has been so fully gone into, and the desirability generally of the change I am now advocating is so well shown, in Lord Cottenham's speech on moving for a Select Committee to inquire into the operation of the Bankrupt Act, 5 & 6 Vict. c. 122¹, and also more recently by a letter addressed to the present Chancellor, that I think I cannot do better than refer the Commissioners to these, and more particular to that portion of the latter from page 31. to page 57.²

“ At page 34, the writer of this letter says:—

“ For the 52 counties in England and Wales, we have only London Court and the seven District Courts. The bankrupt business of the city of London and of no less than 17 counties besides, is all prosecuted in London, and that of the 35 remaining counties is prosecuted in the Seven District Courts; Bristol, Birmingham, Exeter, Leeds, Liverpool, Manchester, Newcastle; the Birmingham Commissioners holding (

¹ See Hansard, 1843, vol. lxx. p. 341.

² A Letter to the Right Honourable the Lord High Chancellor, on the Bills lately introduced by Lord Brougham, a Parliament, for the further extension of the Jurisdiction of the Bankruptcy Law. By a Law Reformer. London: Ridgway, 1853.

sittings at Nottingham, the Exeter Commissioners at Plymouth, and the Leeds Commissioners at Hull and Sheffield. The counties of Bedford, Berks, Buckingham, Cambridge, Essex, Hants, Herts, Huntingdon, Kent, Middlesex, Norfolk, Northampton, Oxford, Rutland, Suffolk, Surrey, and Sussex, are all of them within the jurisdiction of the London Court; while of the 35 remaining counties there are only six in which any Bankruptcy Courts are held. Norfolk, with its 433,000 inhabitants; Hampshire, with its 402,000; Suffolk, with its 335,000; Northamptonshire, with its 213,000; Cambridgeshire, with its 191,000; Oxfordshire, with its 170,000; Huntingdonshire, with its 60,000; Rutlandshire, with its 24,000, all come to London; and so also does the southern division of Wiltshire and a portion of Dorsetshire. The consequence is, that

“ Norwich -	- with 68,000 inhab.	has to go 108 miles
Yarmouth	- „ 26,000	„ „ 124 „
Southampton	- „ 34,000	„ „ 77 „
Isle of Wight	- „ 50,000	„ „ 90 „
Winchester	- „ 25,000	„ „ 69 „
Ipswich -	- „ 23,000	„ „ 69 „
Northampton	- „ 23,000	„ „ 66 „
Cambridge	- „ 57,000	„ „ 51 „
Oxford -	- „ 20,000	„ „ 54 „
Huntingdon	- „ 20,000	„ „ 59 „
Salisbury -	- „ 8,000	„ „ 81 „
Brighton -	- „ 65,000	„ „ 58 „
Dover -	- „ 28,000	„ „ 71 „
Lewes -	- „ 25,000	„ „ 50 „
Hastings -	- „ 21,000	„ „ 66 „
Canterbury	- „ 14,000	„ „ 55 „
Aylesbury	- „ 23,000	„ „ 40 „
Newport Pagnel	- „ 23,000	„ „ 50 „
Poole -	- „ 12,000	„ „ 107 „
Shaftesbury	- „ 13,000	„ „ 100 „
Blandford	- „ 14,000	„ „ 103 „
Sturminster	- „ 10,000	„ „ 108 „
Wimborne Minster	„ 17,000	„ „ 132 „
Maidstone	- „ 36,000	„ „ 34 „
Colchester	- „ 19,000	„ „ 51 „

“ So much for the London district; and I will not fatigue your Lordship by going in the same way through the others, for a single glance at the map will show in a moment that, as regards

these, matters are in very much the same state—bitants of many large and opulent towns have to considerable distances to the District Bankruptcy Court even if Commissioner Ayrton's suggestions were : Commissioners were empowered to perform the duties in Chancery ; or if they had my Lord St. Leonards' powers in aid of the Court of Chancery, and "Deeds" conferred on them, the suitor, although he might have to consume his time and expend his money in London," would still, in by far the majority of cases, be off ; for the consumption of time and expenditure of money in journeying elsewhere would, as regards these, be much the same. It is idle, therefore, and a delusion to suppose that by means of the Bankruptcy Courts "business is brought to his door," or that it ever can be so easy to talk of these Courts as capable of supplying the wants of the community generally ; and when your Lordship speaks of the towns as Carlisle, Chester, Derby, Durham, Gloucester, Leicester, Lincoln, Norwich, Preston, Shrewsbury, Southampton, Huddersfield, Bradford, Halifax, &c., without any Court,—finds that in only six counties in England and Wales, and in only three county towns, do the Courts of Bankruptcy hold that there is not, as Commissioner Ayrton says, sufficient bankruptcy business to occupy the time of the learned Commissioners,—that, in truth, both in London and there is not sufficient bankruptcy business to occupy the time of the learned Commissioners,—that the bankruptcy Court is itself in a state of insolvency, that for its support with a revenue of 79,794*l.* 3*s.* 5*d.*, the expenditure is upwards of 14,000*l.*¹,—your Lordship's Committee arrive at the conclusion that some such reform of these Bankruptcy Courts is imperatively called for.

"The circumstance of the Court being generally removed from the residence of the bankrupt is, in itself, inconvenient, but it must tend also to defeat the great ends of all bankruptcy proceedings, namely, to put the bankrupt's conduct as a trader ; for he obviously cannot be so well or so effectually controlled in the immediate neighbourhood of the place

¹ See Return to an order of the House of Lords, dated 1861, Sessional Paper, No. 58.

doubt cases may arise where it may be expedient to prosecute the bankruptcy elsewhere; where, for instance, a large majority of the creditors live at a great distance from the place of trading, or where it can be shown that it will be more to the interest of the creditors generally, or for the benefit of the estate, to have the proceedings conducted at another place; and for this my Lord Brougham's Bill consequently provides, by giving power to the Chief Commissioner of the Court of Bankruptcy to make special order in any such matter. But, as a general rule, I consider his Lordship's proposition that they shall be had on the spot, or at least as near as possible to the residence, or rather to the place of trading of the bankrupt, to be most judicious and proper. Moreover, it has this further recommendation, that it is a restoration of the old rule which was in force prior to 1842, and it is also in harmony with the recommendations of the Common Law Commissioners, who in their Fifth Report suggest a mode of bringing "prompt justice to every man's door," very different, indeed, to that of Commissioner Ayrton. The Common Law Commissioners say, "It appears to us to be expedient that the whole kingdom should be divided into districts, for the purpose of establishing Local Courts upon an uniform system, and that provision should be made for the trial of causes at such places as shall be best accommodated to public convenience, and shall most effectively exclude the evil of expense in the conveyance and maintenance of witnesses (which now constitute the principal part of the costs of a cause), and the inconvenience now felt in detaining parties, jurors, and witnesses at a distant place of trial. The limits of such districts must, of course, depend much on the extent of population, and the mode in which it is distributed; but in order to effectuate the general principle, it would be desirable that Courts for the trial of causes should be held *in every large market town containing a population of 20,000; that the suitors in a town containing 10,000 inhabitants should not be under the necessity of travelling more than ten miles to the Court; and that the utmost distance of parties from the nearest place of trial should not exceed twenty to twenty-five miles.*"¹

All this is very strong, and we confess ourselves unable to find any answer to the argument in favour of what is proposed, more particularly when we bear in mind that in all cases where a majority of the creditors reside elsewhere, or

¹ See Fifth Report of Common Law Commissioners, 1833, p. 16.

where, for particular reasons, it may be desirable that the proceedings in any given bankruptcy ought not to be conducted at the bankrupt's place of residence or trading, the creditors will still have it in their power to obtain an order to that effect. Mr. Miller quotes other and even stronger opinions in favour of his views, and of the claims of creditors to an investigation of a bankrupt's affairs in their neighbourhoods, now that County Courts have been established in every locality, and these we would gladly give at length, but that we cannot afford the requisite space. He then goes to the expense of the establishment, which we have already referred to, and contrasts it with the amount of business in the different courts, showing convincingly, and from returns which have been made to Parliament, that the whole thing is out of all character—that the Bankruptcy establishment is out of all proportion to the work performed—that while the expense is of the magnitude we have stated, the London Commissioners have little or nothing to do, and the Country Commissioners less—and that if the jurisdiction of the Court were limited to twenty miles round London, one of the Metropolitan Judges sitting in Basinghall Street daily from ten o'clock till four, would in all probability be able ultimately to undertake the business of the limited ambit.

The principal difficulty that attends this scheme, and which in truth attends almost every scheme of reform, is the disposal of the old machinery—is, how best to get rid of the existing force—how to clear the ground of the present cumbrances—the present somewhat formidable list of Bankrupt Commissioners, Registrars, and other officers. The plan suggested by Mr. Miller is, we incline to think, only one which is at all practicable, or can be adopted in the circumstances. We were at the first sight of it alarmed, and felt disposed to think Parliament would not sanction such a proposition; but on investigating the matter and giving it our fullest consideration, our fears were dissipated, and we entirely concur in it, convinced that if twelve or fifteen of the Commissioners and as many Registrars were to be allowed immediately to re-

full salaries, the country must eventually gain by the transaction — convinced that no real commencement of retrenchment and reduction will ever in any other way be accomplished — and convinced also that this question of pounds, shillings, and pence ought not to be allowed to stand in the way of the proposed reform.

It is not suggested that the whole of the Commissioners and Registrars shall at once be cashiered. The plan is to restrict the jurisdiction of the London Court to twenty miles, and to abolish the District Courts, and, in order to avoid the unseemly spectacle of having seventeen Commissioners and as many Registrars dancing attendance in Basinghall Street, to give power to the Lord Chancellor to release such number of them as, having regard to the business of the Court, he shall think fit. In other words, and if we rightly understand it, to retain such a number only of the junior Commissioners and Registrars as would be likely to last for some ten or a dozen years — as would be likely to see all the others out — and that as these die off or resign, the business of the restricted London ambit shall devolve on the Metropolitan Judges of the County Courts for the time being, and who, with that view are made *ex officio* Commissioners. The bankruptcy business now prosecuted in the district Courts, when it comes to be distributed among the County Courts, will clearly form but an infinitesimal portion of the work of such courts, and if that of the restricted London ambit were to afford constant occupation for even two of the Metropolitan Judges, still we should say let the proposed reform by all means proceed. We should say that if the present number of Metropolitan Judges should be unable to overtake it, it is far preferable to have two extra County Court Judges whose leisure time can be occupied in other ways, than to keep up any of these bankruptcy commissionerships. The following are Mr. Miller's observations on this subject: —

“ In the Draft Bill which I have appended, the Commissioners will perceive that I propose to enact that on the winding up of the proceedings which may be pending in the District Courts, the Lord Chancellor shall have power to release such number of the

Commissioners and registrars as he shall think fit; and it will no doubt be said, Why do this—why not retain all—why not allow one of the Commissioners acting in the country to remain at each of the large towns where they now are, and distribute the remainder, so far as they will go, among the other large and populous places? My answer to this is,—

“*First*, that I greatly doubt whether those Commissioners and the County Court Judges would ever, under any system of compulsion, act well or harmoniously together.

“*Second*, that I conceive it to be exceedingly desirable to make a beginning—to commence as soon as is possible the effectual fusion of the Bankruptcy and County Court jurisdictions; and above all,—

“*Third*, that inasmuch as when the outlying places came to be taken away, and the jurisdiction of the Commissioners confined to those large towns and their immediate vicinity, there is no one provincial town—not even Birmingham, Liverpool, or Manchester,—the bankruptcy business of which would employ a Commissioner for a single day in the week, and that such would be a spectacle which, in my opinion, ought by all means to be avoided. The transfer of the jurisdiction to the County Courts, and the prosecution of bankruptcies at the bankrupt's place of trading, would, I have no doubt, reduce the numbers prosecuted at the places where Bankruptcy Courts are now held more than half. I have made no minute investigation of this, but I have no doubt of it. But say it only took away half, it is clear, from the returns, that what remained would never, even in the case of Birmingham, where there appears to be most business, afford occupation for even a single Commissioner. Fifty bankruptcies, being half the average number for the first two years under the Consolidation Act, and supposing there has been no further falling off, would average about four sittings each, which would give 200 sittings, and these would not afford occupation for more than an hour each. We should thus have the Birmingham Commissioner sitting 200 hours in the year—equal to not quite six weeks' work. We should have all the others sitting proportionably less, and we should have the Newcastle Commissioner sitting fifty-eight hours, or about ten days in the year! To ask the Commissioners to do more than to act in bankruptcy,—to compel them to become County Court Judges,—would be unjust, they having accepted specific offices, and holding those offices direct from the Crown, and by Commission under the Great Seal; but if any of them

should be willing to become such (and I should hope several would), I have inserted a clause giving power to the Chancellor to appoint them additional judges,—a mode of effecting the same object which cannot but be more agreeable to their feelings.

“To the grounds I have already named I would add another, viz., the great desirability of being consistent in legislation, of avoiding the anomaly of legislating in one way for one part of the United Kingdom, and in another way for another. I allude to Scotland; and I cannot avoid contrasting the difficulties that were experienced in obtaining the assent of Parliament to the institution of County Courts in England, with even a jurisdiction to the extent of 20*l.*, and the aversion and hesitation about extending that jurisdiction, with the County Courts establishment in that part of the kingdom. In Scotland, the Sheriffs’ Courts not only have a summary jurisdiction to the extent of 12*l.*, but they also have jurisdiction in debt to any amount whatsoever. They have jurisdiction in all personal actions, all actions on contract, lease, hire, loan, pledge, deposit, copartnery, insurance, &c. &c. They are entrusted with an Admiralty jurisdiction, a jurisdiction in all maritime causes, and with the disposal of a vast variety of other matters both civil and criminal, and they have jurisdiction in bankruptcy and insolvency. The adjudication in bankruptcy (sequestration) still issues in the Court of Session, as our flat formerly did by the Chancellor, but nothing further is done there—the adjudication is transmitted to the sheriff, and all further proceedings are conducted before him.

“It will no doubt also be said that, by extending the jurisdiction of the County Courts, and giving to them all the business I aim at (I would transfer insolvency also to the Metropolitan Judges, and abolish the Insolvent Debtor Commissioners), double the present number of Judges would be required. To this I answer, Be it so. Give these Courts unlimited jurisdiction, place two Judges in each district, and let one of them reside at the principal place, and the other go a circuit within the district, holding sittings in the most considerable places. Give, in addition to this, and as was done only last Session of Parliament in the case of the Scotch Sheriff Courts, power to the Treasury, on the representation of the Lord Chancellor, still further to increase the number of the Judges from time to time as occasion may require¹, and endeavour by every possible means to improve and to perfect

¹ See 16 & 17 Vict. c. 80, sec. 37.

these tribunals. Let the names of the Judges be inserted in the Commissions of the Peace for their respective districts, and in all Commissions of Assize and of Oyer and Terminer; and finally, let the office be a stepping-stone to Westminster Hall. Do this, and we shall have efficient local tribunals."

Here we suspect Mr. Miller has, as to one matter, hugely deceived himself. We, with him, sincerely hope that several of these Commissioners may be found willing to become County Court Judges, and thus increase the sphere of their usefulness, but we are by no means so sanguine on the subject. We, however, see nothing else for it — see no other practical mode of getting rid of them — and we therefore assent to what is proposed, convinced, as we have already said, that the pounds, shillings, and pence portion of the question ought not to be allowed to interfere with a plan which appears so desirable, and reconciled to the temporary burden attending it, by the fact that of these Commissioners there are several of nearly half a century's standing at the Bar, and twelve out of the seventeen who are upwards of thirty years' standing, and consequently that no better or more favourable opportunity of carrying it out is ever likely to present itself.

This brings us to the concluding portion of Mr. Miller's scheme, viz., to the state of the finances of the Court, and the saving which he proposes to effect, and which he estimates at upwards of 60,000*l.* per annum, besides the abolition of fees to the amount of upwards of 30,000*l.* more. Here again we must recur to this gentleman's own words. He says,

"As to the safety—the perfect safety of what I have suggested as regards the compensations and retiring pensions—of bringing all the balances into one general account, and out of that account purchasing those incumbrances, and which may possibly at the first blush appear to the Commissioners of Inquiry to be somewhat rash, no fear whatever needs be entertained; as, indeed, appears on the face of the annual returns made to Parliament by the Accountant. I have before me these returns for the years 1850; 1851, and 1852 (*see House of Lords Sessional Papers*, No. 32. 1851, No. 47. 1852, and No. 75. 1853), and I find that the net

balances existing on the 1st day of January, 1851, 1852, and 1853, were respectively 1,495,650*l.* 16*s.* 5*d.*, 1,402,433*l.* 17*s.* 11*d.*, and 1,357,738*l.* 2*s.* 3*d.*, and that while the payments out on the various accounts during those years—the payments by order of the Lord Chancellor, Vice Chancellor, Lords Justices, and Commissioners, and the sums paid as dividends, and for salaries, compensations, annuities, and expenses, amount to 947,020*l.* 11*s.* 4*d.*, 897,459*l.* 3*s.* 8*d.*, and 817,029*l.* 16*s.* 3*d.*, the above net balances vary in but a trifling degree compared with the amount of these payments—vary only to the extent of 93,216*l.* 18*s.* 6*d.* in one year, and 44,695*l.* 15*s.* 8*d.* in the other; thus proving beyond dispute that such balances—balances closely approaching to a million and a half of money, are not only not required to meet the demands of creditors, or for the carrying on of the business of the Court, but, on the contrary, are both cumbrous and perplexing; proving, in short, so to speak, that more capital is employed in the concern than there is any occasion for. No doubt it may be said that all this is the suitors' money, and that the public has no right to lay violent hands on it; but experience having shown that the great bulk of this money is never likely to be wanted—never likely to be called for—that it can be beneficially and profitably employed in the way I have pointed out; that we are every year getting on from bad to worse; that the expenditure during the last year exceeded the income by upwards of 10,000*l.*, having in the preceding year exceeded it by upwards of 14,000*l.*; that unless those compensations and retiring pensions, which are weighing down and ruining the finances of the establishment, are got rid of, matters must become still more embarrassed; and that, with such a margin as I propose to leave untouched, there is not the remotest chance of any deficit; I think Parliament would not hesitate, under these circumstances, to provide in the usual way against such a contingency in the event of its ever occurring.

“That it would take a large sum, a very large sum, to purchase those compensations and pensions, there can be no doubt; but notwithstanding this a very large sum would also still remain. To purchase all that is contemplated under section 28. of my proposed bill would, I should say, take somewhere about 760,000*l.* (taking the lives at ten years' purchase); but this and the other deductions consequent on the reform I have suggested would still leave a balance of 547,482*l.* 10*s.* 2*d.* My proposition would result in this,—

	£	s.	d.
" Net balances on 1st January 1853, as shown by the returns - -	1,357,738	2	3
Add present excess of expenditure over income - - -	10,367	3	11
	<u>1,368,105</u>	<u>6</u>	<u>2</u>

Deduct —

	£	s.
Sum expended in purchase of compensations and retiring annuities, say -	760,000	0
Per-centages on assets on bankrupts' estates, and which I propose to abolish - - -	30,122	16
Loss on interest on Bankruptcy Fund Account -	30,000	0
Fees paid over by registrar of meetings, and which I also propose to abolish -	500	0
	<u>820,622</u>	<u>16 0</u>
Floating balance - -	<u>£547,482</u>	<u>10 2</u>

Leaving a floating balance of no less than 547,482*l.* 10*s.* 2*d.*, a balance perfectly sufficient for all purposes, and, what is more, perfectly free and unencumbered—for the stamp duties alone would be more than sufficient to cover the salaries of the reduced establishment, and the figures show that of this balance upwards of 300,000*l.* might be invested in stock."

Mr. Miller submits his suggestions to the Commissioners of Inquiry, believing them to be "worthy of their consideration, and of being looked into and thoroughly investigated," and in this belief we heartily concur. We only regret that we are unable to give the details of his plan and the arguments in support of it at more length, but there is one observation which we cannot omit, and with it we must close. He says,

"Moreover, as a precedent for what I am now suggesting, I may add that only a few years ago there were in Scotland, besides the Court of Session and the Court of Justiciary, a Court of

Exchequer, a High Court of Admiralty, and a Consistorial Court, each of them with separate and independent Judges, the Court of Exchequer having a Chief and several Puisne Barons. The whole of these are now abolished, and the different jurisdictions have been transferred to the Judges of the Court of Session and to the Sheriffs."

From the County Courts Commissioners we expect much. We expect that one of their recommendations will be, that in all matters of debt, be the amount whatsoever it may, the plaintiff shall have an option — shall be *at liberty*, if he so think fit, to bring his action in the County Court; and that another recommendation will be, that, as regards debts and claims not exceeding 100*l.*, it shall be *imperative* on him to do so.

ART. VIII.—HISTORY OF JURISPRUDENCE.

No. VII.¹—CUMBERLAND: LOCKE.

§ 1. MR. HALLAM has characterised the three different schools which in the third quarter of the seventeenth century cultivated the science of Ethics. The theologians went no further than Revelation, or at least the positive Law of God, for moral distinctions. The Platonic philosophers sought them in eternal and immutable relations. Hobbes and Spinoza reduced them to selfish prudence. Richard Cumberland, Bishop of Peterborough, may be reckoned the founder of a fourth school,—the Utilitarian school of modern times. His great work "*De Legibus Naturæ Disquisitio Philosophica*," was pub-

¹ For Nos. I. and II. see vol. xvi. pp. 59. and 268.; for No. III. see vol. xvii. p. 105.; for Nos. IV. and V. see vol. xviii. pp. 91. and 249.; for No. VI. see *anté*, p. 93. We purpose to continue this series of articles upon the Development of Jurisprudence. A great impulse has recently been given to Legal Reform in England. It may therefore prove not unacceptable to our readers to peruse an historical review of the great writers who have scientifically cultivated Law, comprising a sketch of its internal development. The next Number will contain a review of the legal works of Puffendorf and Leibnitz.

lished in 1672.¹ After briefly discussing former authors, he, upon diligent consideration of all those propositions which deserve to be ranked amongst the Laws of Nature, finds that they may be reduced to one universal law, from the just explication of which all the particular laws may be duly limited and illustrated. This general proposition may be briefly expressed: — “The endeavour to the utmost of our power of promoting the common good of the whole system of rational agents, conduces as far as in us lies to the good of every part, in which our own happiness as that of a part is contained.”²

Hobbes had maintained that the state of nature is a state of war of each against all; Cumberland’s proposition is, that the state of nature with regard to man’s actions, is a universal benevolence of each towards all. The general proof adduced by Cumberland in support of this proposition is, that the general prevalence of such a rule of action and of such dispositions tends in the highest degree to the happiness and well-being of all. But though Cumberland thus advances towards the doctrine of morals supported by modern divines, he nowhere supports his propositions by a reference to Revelation or to a future state.

Grotius, Selden, and others had already investigated the Laws of Nature *à posteriori*, that is, by the testimony of authors and the consent of nations. Cumberland prefers at the outset to deduce the Laws of Nature as effects from the real causes in the constitution of Nature itself. The Platonic theory of innate moral ideas is not admitted by Cumberland. It is necessary to begin with what we learn by daily use and experience, assuming nothing but the physical laws of motion shown by mathematicians, and the derivation of all their operations from the will of a First Cause.⁴

These general moral Laws of Nature may be reduced to one, the pursuit of the common good of all rational agents, which tends to our own good as part of the whole; as its opposite tends not only to the misery of the whole system, but to our own.⁵ This scheme may at first sight appear to

¹ Translated by Rev. John Maxwell. London: Phillips, 1727.

² Introduction, Sec. ix. Maxwell’s Transl. p. 16.

³ Sec. xiv. p. 22.

⁴ De Legibus, Prolegomena.

⁵ Sec. 9.

want the two requisites of a law, a legislator, and a sanction. Nor is a sanction wanting in the rewards, that is, the happiness which attends the observance of the Law of Nature, and in the opposite effects of its neglect. In what Cumberland terms a *lax* sense, but which nevertheless is the true sense, the term sanction includes both rewards and punishments. A sanction is anything which serves to bind.¹

The common good, not any minute particle of it, as the benefit of a single man, is the great end of the legislator, and of him who obeys his will. Such human actions, as by their natural tendency promote the common good, may be naturally called good, more than those which tend only to the good of any one man ; — as the whole is greater than its part. And whatever is directed in the shortest way to this end may be called right, as a right line is the shortest of all.²

In answer to the objection to the practice of virtue from the evils which fall on good men, and the success of the wicked, Cumberland remarks, that no good or evil is to be considered in this point of view, which arises from mere necessity or external causes, and not from our virtue or vice itself.³ In this Cumberland made a near approach to the modern doctrine of the absolute independence of natural laws.

The happiness consequent upon virtue is a true sanction of natural law annexed to it by its author, and thus fulfilling the necessary conditions of its definition. And though some have laid less stress on these sanctions, and deemed virtue its own reward, and gratitude to God and man its best motive, yet the consent of nations and common experience show that the observance of the first end, which is the common good, will not be maintained without remuneration or penal consequences. By this single principle of common good the method of Natural Law is simplified ; and its secondary propositions are arranged in such subordination as best conduces to the general end. Hence, moral rules give way in particular cases, when they come in collision with others of more extensive importance. For all ideas of right or virtue imply a relation to the system and nature of all rational beings.

¹ Sec. 14.

² Sec. 16.

³ Sec. 20.

And the principles thus deduced as to moral conduct are generally applicable to political societies, which in their two leading institutions, the division of property and the coercive power of the magistrate, follow the steps of Natural Law, and adopt those rules of polity, because they perceive them to promote the common welfare.

Cumberland abstains from all intermixture of Scriptural authority; and appears in this respect to have been the first Christian writer who sought to establish the principles of moral right independent of Revelation. Machiavelli had first introduced the method of argument in political matters without reference to Scripture or the Divine authority. Cumberland, thus writing, is admitted to have made an era in the history of moral philosophy, as Puffendorf, whose great work was published in the same year with the "*De Legibus*," is considered similarly to have introduced the same system into legal philosophy. Even Hobbes, to whom Cumberland and Cudworth are so opposed, uses occasionally the arguments founded on Revelation. But, henceforth, in ethical and juridical treatises, the continual appeal is to experience, seldom to authority.

It is very necessary to abridge considerably the statement of Cumberland's opinions. The prolonged argument upon both sides of every question which has long since been summarily settled by the good sense of mankind, is most wearisome. This style is derived from the schoolmen: and it was, perhaps, difficult for Cumberland to emancipate himself from the influence of his clerical studies. Hobbes and Locke are almost totally free from the needless prolixities and endless logical divisions which encumber the pages of the Bishop of Peterborough.

Cumberland was "the only professed answerer of Hobbes." And we must now consider exactly what were the leading points of controversy between them. The question between Cumberland and the school of Hobbes is generally stated to be, whether certain propositions of immutable truth, directing the voluntary actions of man in choosing good and avoiding evil, and imposing an obligation upon them independently of civil laws, are necessarily suggested to the mind by the

nature of things and of that of mankind. The affirmative of this proposition Cumberland undertakes to prove from a consideration of the nature of both; from which many particular rules might be deduced, but above all that which comprehends all the rest and is the basis of his theory; namely, that the greatest possible benevolence of every rational agent towards all the rest constitutes the happiest condition of each and of all, so far as depends on their own power, and is necessarily required for their greatest happiness; whence the common good is the supreme law. It is easy to observe, by common experience, that we have the power of doing good to others, and that no men are so happy or so secure as they who most exert this. This Cumberland proves synthetically and to rigorous demonstration; although it is unnecessary to consider more than our own faculties of speech and language, the capacities of the head and countenance, the skill we possess in sciences and the useful arts, all which conduce to the social life of mankind, and their mutual co-operation and benefit.¹

Two corollaries of importance in the theory of ethics spring from a consideration of our physical powers. The first is, that inasmuch as they are limited by their nature we should never seek to trespass their bounds, but distinguish as the Stoics did *τὰ ἐφ' ἡμῶν*, from those beyond it, *τὰ οὐκ ἐφ' ἡμῶν*. The other is, that as all we can do in respect of others, and all the enjoyment we or they can have of particular things, is limited to certain persons, as well by space and time, we perceive the necessity of distribution, both as to things from which spring the rights of property, and as to persons by which our benevolence, though a general rule in itself, is practically directed towards individuals. Cumberland next shows the aptitude of mankind for the social virtues. These we have the power of knowing by our rational faculty, which is the judge of right and wrong, that is of what is conformable to the great law; and by the other faculties of the mind, as well as by the use of language, we generalise and reduce to propositions the determinations of reason. We have also the power of comparison and of perceiving analogies,

¹ Ex. p. 482.

by means of which we estimate degrees of good, then urges against the unsocial theory of servance of something like this general law in inferior animals, which rarely attack those of their species, and in certain instances live together, and for mutual aid; the contrivances in the human body seemed designed for the maintenance of society, the efficiency of the hand, the voice, and arguments derived from anatomy.

Whatever conduces to the preservation of man being, or to the perfection of his powers, is natural and to be natural good. It is of great use to acquire a clear notion of what is truly good, and what serves most to the happiness and perfection of man; since all the secondary laws of nature, and rules of particular virtues,—derive their authority from this effect. A law of nature, meaning one such great principle of benevolence, is defined by Cumberland to be a proposition manifested by the nature of man, and mind according to the will of the First Cause, that out of an action tending to the good of mankind, the performance of which an adequate reward or neglect of which a punishment, will ensue to such rational beings. This definition is prolonged in the fifth chapter, to which part of the "Legibus" Mr. Hallam remarks both Paley and Mr. Cumberland much indebted. Natural obligation he defines to be that other necessity determines the will to act that is not evil, and of seeking good, so far as appears to the power:—"(*Non alia necessitas voluntatem terminat, quam malum in quantum tale est evitandum, bonumque quatenus nobis apparet.*)"

After having established the primary principle of benevolence, Cumberland next deduces the principles which are called the moral virtues, and first place to Justice; but is far from comprehending the meaning of the term. Justice, in the scientific meaning of the term, includes only those duties which are

¹ Cap. 5. sec. 7.

enforced by the public authority: Cumberland, however, includes under Justice the social duties of liberality, courtesy, and domestic affection. These sentiments, however, based upon a delicacy of feeling abhorrent of compulsion, can never be enforced by law. The ancient philosophers, and even the modern jurists until the eighteenth century, included under Justice almost the whole sphere of human action; and the principal source of the confusion which has arisen in the science of Jurisprudence amongst its cultivators has proceeded from not distinguishing at the outset between ethics and compulsory law.

The good of all rational beings is a complex whole, being nothing but the aggregate of good enjoyed by each. We can only act in our proper sphere, labouring to do good. But this labour will be fruitless, or mischievous, if we do not keep in mind the higher gradations which terminate in universal benevolence. No man should seek his own advantage otherwise than that of his family permits; or provide for his family to the detriment of his country, or promote the good of his country at the expense of mankind. Cumberland, in these sentiments, approaches the level of modern cosmopolitanism. In the development of society, the abnegation of self, and the devotion to the interests of others, become more extolled. Hence arises the praise of patriotism. But as yet the sense of mankind has not been developed into universal philanthropy, nor are the interests of other nations regarded in comparison with our own. In time, however, the word National will become like the term Provincial, an expression rather of reproach than of praise.

These are the principal portions of the treatise "*De Legibus Naturæ*," which relate to Jurisprudence. Mr. Hallam has remarked that, "as Taylor's '*Doctor Dubitantium*' is nearly the last of a declining school, Cumberland's '*Law of Nature*' may be justly considered as the herald, especially in England, of a new ethical philosophy; of which the main characteristics were, first, that it stood complete in itself, without the aid of Revelation; secondly, that it appealed to no authority of earlier writers whatever, though it sometimes used them in illustration; thirdly, that it availed itself of

observation and experience, alleging them generally, but abstaining from particular instances of either, and making, above all, no display of erudition; and fourthly, that it entered very little upon casuistry, leaving the application of principles to the reader."

§ 2. ¹John Locke was born at Wrington, near Bristol, in Somersetshire, in the year 1632,—in which same year, also, Spinoza, Puffendorf, and Cumberland were born. His father, originally a clerk to a justice of the peace, served on the parliamentary side during the civil war, and was promoted to a captaincy: after the restoration of Charles II. he practised as an attorney. By the interest of Colonel Popham, under whom his father had served, the young Locke was admitted a scholar at Westminster, and thence proceeded to Christchurch, Oxford. He took the degree of A. B. in 1655; of A. M. in 1658. After this, we find him applying to the study of medicine, not so much with the perseverance required to ensure practical success, as rather for the benefit of his own delicate constitution.

In 1664, he, as secretary, accompanied Sir William Swan in his embassy to Brandenburg. Returning to England within the year, he applied himself again to his studies particularly to natural philosophy. In 1666 he became accidentally acquainted with Lord Ashley, afterwards Earl of Shaftesbury; Mr. Locke attended him medically, and saved his life by opening an abscess in his side. After Lord Ashley became his most constant friend, introduced him to the first men of the day, and finally retained Locke living in his house as tutor to his only son. Hobbes had been the tutor of two successive Earls of Devonshire, so Locke was the tutor of two successive Earls of Shaftesbury. The eldest son of his noble pupil was afterwards educated by him, and the author of the "Characteristics" had no reason to blush for his master. In 1670 Locke began to form the plan of his celebrated "Essay on the Human Understanding." But we may su

¹ John Locke, b. 1632, d. 1704. Works.—An Essay concerning Understanding: London, 1670, fol. many editions. The Works 1714. 3 vols. fol. Lond.

its rapid progress was somewhat interrupted, first by the increased business entailed upon him when his patron, Lord Ashley, was created Earl of Shaftesbury and Lord Chancellor of England in 1672; and next when he shared in his disgrace. In 1675 Mr. Locke went to France; and from that time, with the exception of a brief sojourn in London during the temporary restoration of Lord Shaftesbury to favour in 1679, remained abroad until the revolution of 1688. He was joined entirely with the revolutionary party; nor did those in power at home neglect to show their sense of his importance. In 1684 he was deprived of his studentship in Christchurch; and in 1685, when the Duke of Monmouth was preparing for his rebellion, the English envoy at the Hague had orders to demand Mr. Locke and eighty-three other persons to be delivered up by the States General; upon which he lay concealed for a year. Whilst thus in hiding he wrote the "Essay on Toleration," at first published in Latin. As with Grotius, his exile gave to Locke leisure for the great work, the "Essay on the Human Understanding," and upon which he had been engaged for upwards of seventeen years. He returned to England in 1688, in the same fleet which conveyed the Princess of Orange. Restored now to his country, and of full liberty to pursue his favourite studies, in 1689 he published his "Essay on the Human Understanding;" and in the same year his two treatises on Government, in which he fully vindicated the principles upon which the revolution had been conducted. The remainder of his life he passed in the studies he loved so well, and in the society of the learned and great, only troubled by his weak health, and the controversies his opinions on some subjects excited. He died on the 28th of October, 1704, in the seventy-third year of his age.

Whatever opinion may be now held as to the value of Metaphysical Science, and of the contributions made to it by Locke, there can be no question as to the great services which his treatises on "Government," "Toleration," and "Education," have rendered to mankind.

In the "Essay on the Human Understanding," Law is

divided by Locke into the Divine Law, the C the Law of Opinion or Reputation. By the actions bear to the first of these, men judge actions be sins or duties; by the second, wh criminal or innocent; and by the third, wh virtues or vices.¹

By the Divine Law Locke understands th has set to the actions of men, whether promu by the light of Nature or the voice of Re Civil Law is the rule set by the Common actions of those who belong to it. As to the L the names Virtue and Vice, in the particular in application through the several nations and s in the world, are constantly attributed only as in each country and society are in reput credit. The measure of virtue and vice is th or dislike, praise or blame, which by a se consent establishes itself in the several societi clubs of men in the world, whereby severa to find credit or disgrace amongst them, ac judgment, maxims, or fashion of that place. part of mankind govern themselves chiefly by this law of fashion; and so they do th them in reputation with their company, little of God, or the magistrate. The penalties breach of God's laws most men seldom serio and amongst those that do, many, whilst they entertain thoughts of future reconciliation, a peace for such breaches. As to the punish the laws of the commonwealth, they frequen selves with the hope of impunity. But no punishment of their censure and dislike wh the fashion and opinion of the company he l recommend himself to. He must be of a usual constitution, who can content himself stant disgrace and disrepute with his own p Solitude many men have sought, but no r society under the constant dislike and ill

¹ Essay on Human Understanding, b. ii. c. 3.

familiars. This is a burden too heavy for human sufferance : and he must be made up of irreconcilable contradictions, who can take pleasure in company, and yet be insensible of contempt and disgrace from his companions.¹

These three then, — first, the law of God, secondly, the law of political society, thirdly, the law of fashion, or private censure, — are those to which men variously compare their actions ; and it is by their conformity to one of these laws that they take their measures, when they would judge of their moral rectitude, and denominate their actions good or bad. Morality is the relation of actions to those rules. Whether we take the rule from the fashion of the country, or the will of a lawgiver, the mind is easily able to observe the relation any action has to it, and to judge whether the action agrees or disagrees with the rule ; and so has a notion of moral goodness or evil, which is either conformity or not conformity of any action to that rule, and therefore is often called moral rectitude. This rule being nothing but a collection of several simple ideas, the conformity thereto is but so ordering the action, that the simple ideas belonging to it may correspond to those which the law requires. And thus we see how moral beings and notions are founded on, and terminated in, those simple ideas we have received from sensation or reflection. For example, if we examine the complex idea signified by the word Murder, when we have taken it asunder and examined all the particulars, we shall find them to amount to a collection of simple ideas derived from reflection or sensation ; — first, from reflection on the operations of our own minds, we have the ideas of willing, considering, purposing beforehand, malice, or wishing ill to another ; and also of life, or perception, and self-motion ; — secondly, from sensation we have the collection of those simple sensible ideas which are to be found in a man, and of some action whereby we put an end to perception and motion in the man ; all which simple ideas are comprehended in the word Murder. This collection of simple ideas being found to agree or disagree with the esteem of the country, and to be held by most men there worthy of praise or blame,

¹ B. ii. c. 28. s. 12.

is called virtuous or vicious; if the will of a visible lawgiver be the rule, it is called good or duty; and if it be compared to the civil law, it is called lawful or unlawful crime, or no crime. So whatsoever we take the rule of moral action, or by whatsoever we frame in our minds the ideas of virtue, they consist only and are made up of collective ideas, which we originally received from sense, and their rectitude or obliquity consists in their agreement or disagreement with those patterns prescribed by the law. Thus the challenging and fighting with a man by a particular sort of action, by particular ideas distinct from all others, is called duelling: which, when in relation to the law of God, will deserve the name of murder; to the law of fashion in some countries, valour; and to the municipal laws of some governments, a capital crime.¹

The two treatises on Government are distinct: in the former, according to the title, "the principles and foundations of Sir Robert Filmer's government," his followers are detected and overthrown; the latter, "concerning the true original extent and end of civil government." In the Preface, Locke expresses the propositions advanced are sufficient to establish the title of King William; to make good his title in the eyes of the people; and to justify to the world the people's resolution to preserve them, saved the nation from the very brink of slavery and ruin."

Certainly Filmer², by provoking such a revolution, did good service to mankind.

Slavery is so vile and miserable an estate of man, and directly opposite to the generous temper and constitution, that it was hardly to be conceived that

¹ B. ii. c. 28. ss. 13. 15.

² Works, "The Freeholders' Grand Inquest;" "Reflections on the Original of Government;" "The Anarchy of a Limited Monarchy;" "The Young Men of England touching the difference between an English and a Hebrew Witch." London, 1679.

man, much less a gentleman, should plead for it. Yet Sir Robert Filmer has done this, and his system lies in a little compass. It is no more but that all Government is absolute monarchy, and that no man is born free. We may in the nineteenth century omit the learned arguments as to Adam's title to sovereignty by creation¹ or by donation.² In the Mosaic account of the creation it is impossible for any sober reader to find anything but the setting of mankind above the other kinds of creatures in this habitable earth of ours. It is nothing but the giving to man, the whole species of man as the chief inhabitant, the dominion over the other creatures.

Locke shows in the first book of the "Treatise on Civil Government," that Adam had not, either by natural right of fatherhood or by positive donation from God, any such authority over his children or dominion over the world, as is pretended by Filmer and his followers; next, that if he had, his heirs yet had no right to it; again, that even if his heirs had, there being no law of Nature nor positive law of God that determines which is the right heir in all cases that may arise, the right of succession and consequently of bearing rule could not have been certainly determined; and lastly, that even if that had been determined, yet the knowledge of which is the eldest line of Adam's posterity being so long utterly lost, that in the races of mankind and families of the world there remains not to one above another the least pretence to be the eldest house, and to have the right of inheritance. And these premises being laid down, Locke considers it impossible that the rulers now on earth should make any benefit, or derive the least shadow of authority, from that which is held to be the fountain of all power,—“Adam's private dominion and paternal jurisdiction;” therefore he that will not give just occasion to think that all government in the world is the product only of force and violence, and that men live together by no other rules but that of beasts, where the strongest carries it. Hence, there must be of necessity found out another rise of government, another origin of political power. Political power is then defined by Locke to be the

¹ Locke on Government, b. i. c. 3.

² B. i. c. 4.

right of making laws with penalties of death; consequently all less penalties for the regulating of property, and of employing the force of the state in the execution of such laws, and in the defence of the commonwealth from foreign injury; and all the laws for the public good.¹

The natural liberty of man is to be free from all subjection of power on earth, and not to be under the will of any authority of man, but to have only the law of nature for his rule. The liberty of man in society is to be under no legislative power but that established by the laws of the commonwealth; nor under the dominion of any man, but under the strait of any law, but what that legislative power has put according to the trust put in it. Freedom, then, is what Sir Robert Filmer tells us, "a liberty for a man to do what he lists, to live as he pleases, and not to be under any laws," but freedom of men under government is a standing rule to live by, common to every one, and made by the legislative power erected in society to follow my own will in all things, where the law does not; and not to be subject to the inconstant, contrary will of another man, as freedom of nature is without any other restraint but the law of Nature.²

This freedom from absolute arbitrary power is necessary to, and closely joined with, a man's preservation; he cannot part with it, but by what forfeits his estate and his life together; for a man not having his own life cannot by compact or his own consent put himself to any one, nor put himself under the arbitrary power of another to take away his liberty or his pleasures. Nobody can give more power than he has, and he that cannot take away his own cannot give another power over it.³

The perfect condition of slavery is nothing but a state of war continual between a lawful conqueror and a captive; for if once compact enter between the conqueror and the captive, an agreement for a limited power on one side

¹ B. ii. c. 1.

² C. iv. s. 22.

³ C.

the other, the state of war and slavery ceases as long as the compact endures ; for as has been said, no man can by agreement pass over to another that which he hath not in himself — a power over his own life.¹

Locke advocates the doctrine of a negative community of things, and deduces the title to all property from labour. Though the earth originally and all inferior creatures were common to all men, yet every man has a property in his own person. The labour of his hands and the work of his hands are properly his. Whatsoever then he removes out of the state that Nature has provided he has mixed his labour with and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature has placed it in, it has by this labour something annexed to it which excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, "at least, where there is enough and as good left in common for others."²

The right of appropriation is founded both on Natural Reason and the Divine Law. God gave the world to man in common ; but since he gave it them for their benefit and the greatest conveniences of life they were capable to draw from it, it cannot be supposed He meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational, not to the fancy or covetousness of the quarrelsome and contentious.³

Locke's argument on the right of appropriation grounded upon the fact of the same plenty having been left to those who in the early ages of the world would employ the same industry, cannot be supported. Nor is it enough to lay down labour as the sole primary title to property. Occupancy must always have preceded labour ; as a chattel must always have been at least possessed before personal exertion could have been expended on it. He is, however, right in calling attention to the fact that the man who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind, for the provisions tending to the

¹ C. iv. s. 24.

² C. v. s. 27.

³ C. v. s. 34.

support of human life, produced by one acre cultivated land, are far more than those which an acre of land of an equal richness lying wa

The sixth chapter of the Treatise on Government the paternal power. Though Locke had laid that all men by nature are equal, he did not of equality: age or virtue may give men a just excellency of parts and merit may place of common level. Birth may subject some, and benefits others, to pay an observance to those of gratitude, or other respects, may have made this consists with the equality which all men respect of jurisdiction or dominion one over equality being the equal right which every man natural freedom, without being subject to the rity of any other man.²

The power which parents have over their from that duty which is incumbent on them their offspring during the imperfect state of childhood though the father's power of commanding extends than the minority of his children, and to a degree the discipline and government of that age, and honour and respect, and all which the Latin which they indispensably owe to their parents time and in all estates,—with all that support which is due to them,—gives the father no power; yet it is obvious to conceive how easy it ages of the world, and in places still where people gives families leave to separate in quarters, for the father of the family to become it. The natural fathers of families, by inheritance became also their political monarchs; and, as to live long, and leave able and worthy heirs successions or otherwise, so they laid the foundation of hereditary or elective kingdoms under several conditions, according as chance or contrivance mould them.³

¹ C. v. s. 37.

² C. v. s.

³ Civil Government, c. vi. s. 76.

In the next chapter Locke discusses the rights between husband and wife, parent and child, master and servant, upon principles now generally recognised, and which it is unnecessary to detail.

In the eighth chapter of the *Treatise on Civil Government* the beginning of political societies is considered. Locke founds this on consent,—the doctrine afterwards expanded by Rousseau in his "*Contrat Social*." Man, being by nature free and equal, no one can be subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their safe living in a secure enjoyment of their properties. This any number of men may do ; because it does not injure the freedom of the rest. And thus what actually begins and constitutes any political society is nothing but the consent of any number of freemen capable of a majority, to unite and incorporate into such a society.¹

Locke then discusses the objections to this doctrine, of which the main objection is, that there are no instances to be found in history, of a company of men independent and equal amongst another that met together, and in this way began and set up a government. His answer to this objection is, that government is everywhere antecedent to records, and letters seldom come in amongst a people till a long continuation of civil society has, by other more necessary acts, provided for their safety, ease, and plenty ; and then they begin to look after the history of their founders, and search into their original after they have outlived the memory of it. But Locke does not notice the principal objection, that the doctrine of such a compact presupposes an already existing consciousness of a state, and a form of law amongst a people. In history, also, the earliest records of governments are those of chieftains ruling by force, not at all by consent of the governed.

The chief end of men's uniting into commonwealths is the preservation of their property. Locke states admirably the things wanting to this in the state of nature. First, there is

¹ C. viii, ss. 95—99.

wanting an established, settled, known law, followed by common consent to be the standard wrong, and the common measure to decide all between them; for, though the law of Nature intelligible to all rational creatures, yet men by their interest as well as ignorant for want are not apt to allow of it as a law binding to the application of it to their particular cases. So in the state of nature there is wanting a known judge, with authority to determine all differences to the established law; for every one in that state is judge and executioner of the law of Nature, men to themselves, passion and revenge are apt to go far in their own cases, as well as negligence and remissness to make them too remiss in other men's. In the state of nature there often is wanting power to support the sentence when right, and to give execution.¹

Man in the state of nature has two powers: one to do whatsoever he thinks fit for the preservation of himself and others within the permission of the law of Nature, which law, common to them all, he and all the rest of the kind are one community distinct from all other; the other is to punish the crimes committed against the law. The first power he gives up to be regulated by the society, so far forth as the preservation of the rest of the society shall require: the power he wholly gives up, and engages his natural force before employ in the execution of the law of Nature by the single authority, as he thought fit to assign to the power of the society, as the law thereof shall require.

Locke is erroneous in considering the established legislative power as the first and fundamental in all communities. The judicial power is prior in time, as disputes must always have arisen before the legislative power is perceived of settling them definitively by a law, and the Common Law proceeding from thence.

¹ C. ix. ss. 124—126.

² C. i.

sciousness of the people, of which custom is the recognizable sign, must always have preceded statutable legislation.

The legislative power is that which has a right to direct how the force of the commonwealth shall be employed for preserving the community and the members of it. Locke divides the executive power into two portions,—one, the executive power properly so called, which sees to the execution of the laws that are made;—the other federative, which contains the power of war and peace, leagues and alliances, and all the transactions with all persons outside of the commonwealth.¹

After discussing conquest, usurpation, and tyranny, Locke considers the question of the dissolution of government in a chapter which manifestly alludes to the Revolution of 1688. Governments are dissolved when the Legislature or the Prince act contrary to their trust. But revolutions of this kind do not happen upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty, will be borne by the people without mutiny and murmur. But, if a long train of abuses, persecutions, and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they lie under, and see whither they are going—it is not to be wondered that they should then rouse themselves, and endeavour to put the rule into such hands which may secure to them the ends for which government was at first erected, and without which ancient names and specious forms are so far from being better that they are much worse than the state of nature or pure anarchy; the inconveniences being all as great and as near, but the remedy further off and more difficult.²

This doctrine of a power in the people of providing for their safety anew by a new legislature, when their legislators have acted contrary to their trust by invading their property, is the best fence against rebellion, and the most probable means to hinder it; for rebellion being an opposition, not to persons, but authority, which is founded only in the constitutions and laws of the government; those, whoever they may

¹ C. xii. ss. 145, 146.

² Sec. 225.

be, who by force break through, and by force justify their violation of them, are truly and properly rebels; for, when men, by entering into society and civil government, have excluded force, and introduced laws for the preservation of property, peace, and unity amongst themselves: those who set up force again in opposition to the laws do *rebellare*; that is, bring back again the state of war, and are properly rebels.¹

As to the common question, "Who shall be judge?" Locke replies, the people shall be judge; for who should be judge whether his trustee or deputy acts well, and according to the trust reposed in him, but he who deposes him, and must, by having deposed him, have still a power to discard him when he fails in his trust. And further this question, who shall be judge, cannot mean that there is no judge at all; for, where there is no judicature on earth to decide controversies among men, God in heaven is Judge. He alone, it is true, is Judge of the right. But every man is judge for himself, as in all other cases, so in this, whether another hath put himself into a state of war with him.²

ART. IX.—REFORMATORY INSTITUTIONS.

1. *Report of the Proceedings of a Conference on the Subject of Prevention and Reformatory Schools, held at Birmingham on the 9th and 10th December, 1851.* London: Longman and Co. 1851.
2. *An Account of the Reformatory Institution for Juvenile Offenders at Mettray, in France.* From the Pamphlet of M. Augustin Cochin, LL. D. And an introduction by the Rev. George Hans Hamilton, M. A., Chaplain to the Durham County Gaol and House of Correction. London: Whitaker and Co.; Andrews, Durham. 1853.
3. *The Speeches, as reported, at the Conference and Public Meeting at Birmingham, on the Subject of Juvenile Delinquency.* Dec. 20. 1853.

It is easy to find fault with things as they are, but not

¹ Sec. 226.

² Sec. 241.

so easy to provide the remedy. Illustrations of social defects, errors which require correction, matters which crave improvement, are of every day occurrence; but to discern the blot, cavil at the mistake, or clamour for amendment, may well consort with an entire absence of ability to redress the wrongs. M. Cochin's Pamphlet, mentioned at the head of this article, shows, however, that in a neighbouring country something of value has been accomplished in mitigation of that vast domestic evil, juvenile delinquency. We are now endeavouring in England to arrange a scheme for reforming young offenders with an earnestness to which the late important gathering at Birmingham, and the Parliamentary Report of a Select Committee, bear ample testimony. It is matter for hope, if not for expectation, that the ministers of this movement will be able to work out a plan, reformatory like that of Mettray, and yet agreeable to the genius and character of their nation. Difficult as is the task, it behoves the authors of it to persevere against discouragement, to harmonise their agencies, and tempt every well-wisher to the cause into active service.

But to return for a moment to the thesis with which we have set out—to the crowded drama of wrongs which require vindication, and the facility of finding fault, (*with too much justice*, it must be owned)—we may observe, that if we place before the reader some examples of existing evil, we shall not content ourselves with idle censure, but strive to bring before his notice the means of vigorous redress.

If a youth should be tempted to steal a minced pie, or a gooseberry pudding, or a faggot of wood, or a loose handful of turnips (the law puts a very wary diversity between stacked turnips and growing turnips, between stacked or faggoted wood and growing wood), he is liable, if he should decline the beneficent discipline of the Juvenile Offenders' Act, to undergo all the process of an accused felon in the face of a solemn and august tribunal. Having had his hearing before the magistrates, the young thief is remitted to the sessions, awaiting for a week, or for six weeks, according to the chances of the time, the ordeal of a trial by jury. Emancipated from a short confinement, and refreshed by the

interlude of a whipping, he returns common home, from whence he speedily emerges to harvest of iniquity. Caged and free by turn in the scale and calendar of crime till repentance is difficult, and reformation almost hopeless. Condition of the delinquent bettered with confession and submission to the test of the Act for more effectually dealing with Juvenile Offenders. In most instances, at an early age, he is subjected to the correction of the law, and the smart of that sentence the lad could repeat to his parents, or be admitted to a school of right. Opponents of the whip might possibly find few converts to their numbers. It needs scarcely to be added that frequently, new haunts and fresh sins harden the novice.

If, again, the convict prisoner has attained to a new life when corporal punishment is forbidden, his position is little less critical than it would be at the Sessions; the hope of him, in a moral sense, is desperate. It is owing to the sad recurrence of these early visitations, that we find them repeated in our calendars, till the Judge has ceased to count no longer on severity.

Yet, although the agents of small larceny are the larger class of juvenile wrongdoers, there are also felons whose predicament is as evident as that of the thief. There is the boy incendiary. In the midst of the round of suspicion has visited every character in the neighbourhood of an agricultural village, numerous arrests, and fresh burnings, in vain watchings, it has been discovered that the mischief which had spread ruin and panic abroad, was done by a puny stripling, a mere urchin. Of the many exploits of serious plunder is a boy, not yet of an appearance calculated to deceive. It is not pretended that any of the classes of offenders are entitled to an "acquittal," or to a "from want of discernment." The majority are in the arts of their pernicious livelihood. E

all of them, whether thieves, or robbers, rickburners, or pilferers, have so many things in common amongst them as scarcely to allow of much distinction, and that the whole body, without regard to their individual ill-doings, may be regarded as subjects for a fitter institution than a prison.

There is another host of misdemeanants, who, if we are to adopt the opinions of the Birmingham Conference, should be viewed in the same aspect with the thief. These are habitual vagrants. How the Legislature is to define the errant course which is to constitute habitual vagrancy we do not stop to inquire; it is sufficient to find this manner of life noted as a material evil, and to admit the justice of the charge. Undoubtedly the practised mendicant may be well suspected of predatory impulses, if occasion should offer, and a hardened beggar may be found as difficult of reform as an incorrigible pickpocket (indeed the idle wanderer is often a worse character than the thief); yet, although our own opinion preponderates in favour of uniting both classes, some might think that a national establishment should be tried upon convicts for theft or felony, in the first instance, leaving the habitual vagrant for a future, or, at all events, a separate arrangement.

We do not observe much reference to the care of female children. The Juvenile Offenders' Act embraces both the sexes. The institution at Mettray is for boys only. The speech makers and pamphleteers point chiefly to young lads. We believe that the reformatory houses of discipline now in action are not, for the most part, asylums for females. Yet this section of the community, the erring young female, ought not to be lost sight of. Should the more extensive scheme of Government interference succeed, it will naturally follow that females will be called by bad persons, in aid of thieftcraft, to supply the wants of their vicious markets. We throw out this suggestion merely by the way, not to embarrass the subject, but to guard against the chance of an improvident omission.

There are no grounds for misgiving in the prosecution of remedial labours, if the virtue of moderation be allowed to temper enthusiasm. Formidable as are the mischiefs which

it has become desirable to meet and surmount, still, if we love wisely and not too well, there are considerations of encouragement which have a tendency to clear away difficulties and cheer the right-hearted men who are fostering this young cause. It may not be the least of these gleams of hope, that the reappearance of the culprit on the same stage will be comparatively rare. The greedy band of peculators may be giants in the way of the slothful, but their herding in throngs and clusters is the more favourable for their dispersion. The catalogue of wrongs may be enormous, but the brigade of performers may not be so numerous. With a roll of shifting names, and a fair share of disguise, a small circle might easily delude society into a belief that crime was very rife and theft unbounded. But although we do not deny that the nurseries of robbery are abundant, we hold it to be a matter of consolation that they plunder in hordes, and are often grouped in localities. We have heard of by-ways, not many years since, where every house could record the surrender of some victim to the hangman. We have it on authority that some streets have been known, even in broad day, to be unsafe for the traveller. Such dwellings form the "infected row" of the poet, where

" Boys, in their first stolen rags, to swear begin,
And girls who heed not dress, are skill'd in gin,
Snarers and smugglers here their gains divide,
Ensnaring females here their victims hide."

To break up this scene of social misconduct is not impracticable for private enterprise; with the help of Government success would be far more promising.

Another source of expectation is, that where kindness has been the rule and severity the exception, the scale has descended in favour of the gentler treatment. This consideration not only shows the withdrawal of the dishonest stripling from further crime and greater contamination, but it proves likewise that reformation and restraint go hand in hand. The public gain, the individual is benefited. Mr. Hamilton tells us in his Report for October, 1853, as chaplain of Durham gaol, that there is a field connected with the prison,

“ under the direction of their discipline officer, who is himself a gardener. This field is not surrounded by a high wall, nor guarded by a strong gate, yet not one attempt to escape has been made. The boys generally conduct themselves with perfect propriety; any slight breach of discipline is at once prevented by withdrawing from the transgressor the privilege of working in the garden for a few days; and this deprivation is alone sufficient to ensure good conduct.” Precisely in the same spirit was the reply of a boy at Mettray, recorded in the pamphlet mentioned at the head of this Article. He was asked why did he not make his escape? “ Because,” said he, “ there are no walls, and it would be cowardly.” A similar testimony is conceded by the well-known and appreciated Mary Carpenter, in her book of *Juvenile Delinquents*. She cites an instance of a gentleman, who, wearied with the military salutes he met with from the officials at Parkhurst Prison, at length approached some brickmakers and entered into conversation with their master. “ ‘ O, Sir,’ said this man, ‘ I find the right way is to be kind to them [the boys]; it is much easier to lead them than to drive.’ *And the man’s face showed that he acted on this conviction.*¹ He added, ‘ a boy, if he is put out by being harshly treated, can always find a way of having his revenge; he will turn over his barrow, or spoil his work in some way, and that so cunningly as to make it appear as the result of accident.’ I was not surprised to hear that there had never been an attempt to escape on the part of the worthy brickmaker’s boys.” We need not dwell longer upon a position so obvious as that laws, when administered by man, savour but little of perfection, or that rightly tempered mercy is more congenial to the human soul than the prosy denunciations of “ Justice, Judge, or Vicar.” With these brief remarks we may pass from the contemplation of acknowledged evils, — from the recognition of a verdict unanimous in favour of their existence.

The history of youthful depravity reveals the constant breach of the Divine Law, if not invariably of the Eighth Commandment, yet, at all events, of the precepts of the Gospel. Independently of the religious wrong, respecting

¹ The Italics are our own.

which the teachers of our Churches are (history affords proof of a widely spread soci

He who shall be firm in cherishing t form (be he whom or of what class he n the infant or youth from public exposure will have helped in mitigating a vast moral by the accumulation, instead of the waste, substitution of cheerful labour for savage smile of industry for the scowl of the misc of pleasure for a brief age of pain.

We have before us the efforts of kind m tion of the young criminal. We have sele paragement to other labours, the account o Institution at Mettray, and the proceeding ham Conference. The perusal of Mr. Ha and of the speeches delivered at that recen ing, will give a fair insight into the vie of the question. These are amongst the positions of the system. Not that they a the sole representatives of the cause. Sel the House of Commons have met, and ha subject. The works of Miss Carpenter are facts and applications. Accounts of prais schools, of houses of refuge, and asylums t wandered from rectitude, pour in upon us But our province here is not to celebrat private benevolence. We have to criticis comprehensive scheme—a national endow tion fed from various channels—from the funds of local taxation and individual c be) the contribution of the relieved parent

Before, however, we enter in detail upon it may be well, by way of caution, and in the Conference, to anticipate an obvious measures, and to venture a suggestion upon To advert, in the first instance, to the obje curred to some, and the censure will be reg for bettering the vicious, the profligate, a will go hard to injure the honest and untai

support of this view, it may be added, that the Legislature has gone so far as to pass an Act "For the Care and Education of Infants who may be convicted of Felony."¹ It is true that the execution of the sentence is not interfered with; and, far from blaming, we applaud the mild intentions of the Legislature; but the entire change of feeling within the last century towards offenders shows that the force of public opinion may afford colour for a cautious objector. The Juvenile Offenders' Acts sound certainly *in pœnam*, but still their motive was to avoid the gaol, and their administration was with a view, not to severity, but mitigation. We do not propose to encourage any undue sympathy for offenders, (of which certainly there have been instances of late years,) when we say that any scruple at a Reformatory School on the score of neglecting virtue and industry, is a plausible fallacy. It is for many reasons an insubstantial doubt — it would fail if we were to take issue at once, and affirm that the honest man is by no means damaged by a *proper* asylum for his erring brother. But a scheme of reform must obviously tend to the increase of the general substance; and the lessening of public expenses must, indirectly at least, benefit the upright workman. The idle and unreformed must frequently be maintained in prison; the working part of the community bear, virtually, a share of the tax; and although it may be a delicate point to touch upon, a small larceny committed by an ignorant and uneducated child may not be a higher offence than many private misdeeds amongst commercial men of which the law takes no cognizance.

We now adventure the suggestion we promised. By using emphatically the word "*proper*" in a recent sentence, we have given earnest of our meaning. The Poor Laws are confessedly a heavy drain upon industry. If they answer the purpose of providing for the destitute, and alleviating poverty, the central authority and local establishments involve vast outlays, and demand a corresponding revenue. A criminal Poor Law would be still more objectionable. A government board, with its incidents, would induce a sequel entirely unlooked for by the kind promoters of Reform. The country may well accept, and with thankfulness, an aid from the

¹ 3 & 4 Vict. c. 90.

public resources ; but we desire not to see this hands of Parliament to the exclusion of private and the unpaid labours of zealous men. The the Reformatory School at Hardwicke (four miles) will probably agree with us. They “ mental or even comfortable buildings,” remark feel most strongly that, though it is of great in children who have erred should have an opportunity of improving themselves, yet that would be a fatal to those children who have unhappily fallen into placed in a position which those who have been not attain to ; and we think ourselves fortunate to find a bailiff who appears to agree with us—the conversion of unfortunate boys into good labourers is of more value than exciting the admiration of a casual visitor.

Notwithstanding the Spartan comfort intended in the early part of this paragraph, we must, in justice, say that “ the buildings now consist of a cottage for the family, two rooms for the schoolmaster, and a school-room for twenty boys, a carpenter’s shop, sixteen pigs, stalls for three cows, and they are commencing more pigsties and a barn. The dwelling of the bailiff, the schoolmaster, and the boys are all of the plain and cheapest style of labourers’ cottages,” &c.

Perhaps there may be different opinions as to what is “ comfortable.” The absence of this comfort probably includes more than the boy would enjoy in a more comfortable dwelling except in prosperous, though brief seasons of plenty might ripen into wantonness, and the chief contribution which contributes is by no means the large “ *Sic vos, non vobis, vellera fertis oves.*”

This is the meaning of the moderation so desired in carrying out an extensive and admirable plan of reformation. In order to secure the general favour, there should be no absolute want of ostentation,—a dispensation of officials ; vigilance without the turnkey, and the perpetual sense of punishment.

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Reformatory Institutions.

There is not much of the gaol in the following description of Mettray : —

“At the end of the room” (*i. e.* the room where the children dwell), “is a small recess closed in front with a Venetian blind, which allows the occupant to observe what is passing in the adjoining apartment, without being himself visible. Here the *Head of the Family* sleeps. He has charge of two sections of twenty children, and is assisted by two *monitors*, who are elder boys chosen from among themselves. These monitors keep watch alternately during night.”¹ (*Hamilton*, p. 18.)

Plainness at Mettray seems not to be incompatible with health : —

“Each house measures in length 39 ft. 4 in., and 19 ft. 8 in. in width, and consists of a ground floor with two upper stories. The room on the ground floor serves as a workshop for different trades. In some of the houses it is divided into four compartments by partitions, which are low enough to admit of free inspection by an overseer placed in the middle, but sufficiently high to prevent the children, when seated, from seeing each other and holding any intercourse. The air circulates readily in the open space above, maintaining the same degree of temperature in each of the working compartments.” (*Hamilton*, p. 17.)

We turn with pleasure to the cartel of health : —

“Almost all the children arrive at Mettray in a pitiable state of health : many of them born with bad constitutions ; unwholesome food, and, in particular, immoral habits, have gangrened others. Some are taken from the cellular van into the infirmary never to quit it : nevertheless, thanks to a better diet, to better habits, and to the care of the physicians, Messrs. Morand and Anglada, only 81 children had died there.” (*Hamilton*, p. 29.)

The table cited then shows, that in thirteen years (*i. e.* 1840—1852, inclusive of both years,) these eighty-one deaths are to be reckoned from 4828 lives ; consequently the sum is $59\frac{7}{11}$ per cent. during the period, or little more than six

¹ We do not intend to hold up any system of espionage to commendation as a rule of practice. But the surveillance of the police (to borrow a French phrase) obtains even in England to a certain extent ; and some considerable degree of astuteness seems necessary in a school of this kind to manage, in the first instance, spirits which, in some respects, are far more acute than even the governors set over them.

annually. Yet there is nothing so alluring in the discipline as to make this Reformatory abode either a spot to be especially sought after by youth, or a spectacle for the inquisitive visitor. This is easily shown: —

“When a serious breach of discipline is committed, the under-master has orders to send the offender to the ‘*room for reflection*,’ where he remains a short while before being visited by a Director; in this interval the child becomes calm, the Director informs himself of the circumstances, and the punishment, if merited, is never inflicted under the influence of irritation.” (*Hamilton*, p. 27.)

We would, therefore, tender our counsel, that in modelling a new school for youth, no parade should be permitted, no strictness savouring of military coercion, no centralised junta armed with despotic power, no complicated machinery of appeals and references; nor should it be an establishment of sympathy for crime, which is of itself sufficiently odious; nor of self-exalted teachers; nor, above all, a periodical show-room, where sudden transitions from vice to virtue are represented, and moral cures rehearsed to admiring and applauding strangers.

“Gentlemen,” said the Minister of Public Instruction, when addressing some worthy labourers in a good cause: “I do not praise you; your works are not gratuitous, you receive your reward in their realisation and success.”

On the 19th of December, in the last year, a conference and public meeting was held at Birmingham on the subject of Juvenile Delinquency. The attendance was numerous, and the assembly influential. It was, in effect, the continuance of a similar conference at the same place in 1851, which was likewise a highly attractive and important gathering. The Report of the Conference of 1851 is referred to at the head of this Article.

The resolutions proposed in 1853 (at the more recent meeting) were adopted. There were some slight diversities of opinion on insulated points, which, looking to the freedom of English discussions, were almost unavoidable and are even desirable, but the main feature of Reform was never clouded, and the principle which had tempted so many from

their homes at that inclement season received a hearty salutation of assent. After a flourish of trumpets in honour of a Report of a Select Committee of the House of Commons, a meed of praise which was due to that Committee, the Conference proceeded at once, *in medias res*, to the pith and marrow of the question. Their resolution, in which is embodied the chief considerations on the subject, stood thus:—

“That, properly to effect the great object contemplated in the preceding resolution (*i. e.* the resolution concerning the reform of young criminals), this Conference is of opinion that the country requires legislation for the encouragement of Reformatory Schools for children convicted of crime or habitual vagrancy; and that such schools should be founded and supported in the manner pointed out by the Resolutions of the Committee of the House of Commons, namely, partially by local funds, and partially by contributions from the State.”

This resolution, which was carried, is the groundwork of the system. It resolved itself, however, into other details; as that powers should be given to enforce either this reformation or industrial training, or a suretyship for good conduct; that powers should be given in certain cases to apprentice or otherwise usefully provide for the children upon their leaving the school; that a portion of every child's cost of maintenance at a reformatory school should be recoverable from the parents, in order to guard against the probable contingency of parental negligence.

There is one obvious merit in these resolutions; they are conspicuous for brevity and singleness of purpose. There can be no mistake as to their intentions. If any explanation were desired it would be as to the distinction between crime and habitual vagrancy. In 1851 the resolutions embraced Industrial Schools, Industrial Feeding Schools, and Correctional or Reformatory Schools. Those of 1853 comprise the subjects of crime and habitual vagrancy without so strong a reference to mere industrial establishments. The meeting of 1851 agreed to claim from the parents of vagrant children the expense of the outlay expended upon the work of reformation. That of 1853 seems to unite both the cases of crime and vagrancy as a ground for recovering the costs of main-

tenance from the unfit guardians of youth. We understand the intention to be for a child convicted of felony or of an offence punishable as felony, or for what is termed habitual vagrancy, to be transferred at once from the magistrate or bench of magistrates to the reformatory house. And, in both of these cases, we presume that the parents are to be involved in the expenses of the provision made for their children.

This Conference, moreover, was managed with a due respect to order. Allusions to industrial schools and general education were not received with complacency, being irrelevant to the particular objects of the meeting. On one point alone did there appear to be a disunion of sentiment; the battlefield was the long litigated issue as to punishment. But this incidental discussion gave no disturbance to the general zeal.

We think that the practical matters before us are without difficulty resolvable into two or three considerations. The condition of the juvenile so soon as he passes the ordeal of the magistrate; the character of the misdemeanour which shall subject him to school discipline; and the money proceedings, as well with reference to help from the Government, as the manner of recovering the costs.

With regard to the actual position of the offender upon his conviction by the Bench, or, in certain cases, by the Magistrate, the question of *preliminary* punishment was stoutly brought forward and advocated at this assembly. The attempt, however, to affirm the propriety of such an infliction did not achieve success. Yet it received a sufficient amount of support to warrant the likelihood of its revival at no very distant time. We must deal with this lateral proposition, for it is of no slight moment to ascertain whether a child who is destined to undergo a striking experiment of reform, should begin his day of improvement with a noviciate of rigid coercion. Without entering here upon the question of corporal punishment, which met with a very slight share of advocacy, we must confess that Captain O'Brien's amendment in favour of "a preliminary period of correctional discipline," was too much in accordance with our censurable prison discipline to

win the affections of children to education.¹ Not all Mr. Jelinger Symons's experience as inspector of schools can convince us that he was right in giving his weight to this proposition. He remonstrated, that if nothing of a practical nature were introduced, they would have advanced but slightly upon the Conference of 1851. And so far we may agree with him.

It is strange that the ruling idea in the majority of minds is that of Punishment. Kind, undoubtedly, are many of that majority; sympathy they possess; regard for every right step they cherish; but they are unhappily inoculated with one irresistible notion,—the child must be corrected ere he can be reformed. Now, this is the cart before the horse; if we were to say, the child must be reformed before he can be corrected, perhaps we might approach the truth. Mr. Monckton Milnes not only lent his voice to this doctrine, but said that in deference to public opinion, he would call for preliminary and even corporal punishment. We are inclined to hold, that if public opinion were to be crowned as the idol of action, there would never have been any reformatory schools at all. Public opinion denounces as Utopian the rare suggestions of talent; public opinion follows in the wake of the struggle which the laborious few have encountered and overcome; public opinion may be friendly to the school of Reform, but that school has been first fostered in solitude; public opinion may approve of punishment as the harbinger of improvement, but when substantial experience to the contrary, even now ripening, shall have been matured in new institutions, public opinion will change its ground and surrender its misconceptions.

We hope to see the early offender translated at once from the tribunal of the first instance to the moral abode destined

¹ To prevent misapprehension, we give the amendment *in extenso*. "That the treatment in these schools shall consist of a preliminary period of correctional discipline, at the discretion of the Board of Management, of hard labour in different branches of productive industry, of practical industry, of practical instruction in elementary subjects, and of religious and moral training, under the control of a chaplain, with due regard to the religious liberty of dissenting inmates, according to the provisions now made in Her Majesty's gaols and workhouses."

for him. He is esteemed in the light of an infant, *νηπιος*, without discernment. He has been already hardened by blows, his conscience is seared, his perceptions almost past feeling. We would not have the people of this country misled by so preposterous a fallacy as an attempt to vindicate the law by beating one who is callous on that score, imprisoning for any term a child who would feel outraged at that treatment, pressing him with the hardships of labour when your object is to win him to close industry.

Having intimated that thieving and vagrancy are probably to be combined in the same measure of amendment, we must caution those who are to determine upon the propriety of this union against confounding with the question petitions from the schools of parochial workhouses against the admission of dishonest and degrading persons into their society. Very many children of parents who are urged by poverty to seek relief from the parish are uninitiated in vice, would shrink at crime, have no crafty education, and few other blemishes than those which are common to an unlettered population. But as soon as you suffer the leaven of cunning and rapine to mix with the simple peasant or townsboy, the teacher, if he be alive to the duties and interest of his office, becomes awakened to the bad distinction, and is only too rejoiced if he can rid himself easily and speedily from the canker which is preying upon the heart of his community. We incline to the belief, that the more diligent the inquiry into facts, the more clearly it will appear that the young thief and the young vagrant approximate in vice. When we cast our eyes over the records of the two conferences, we find frequent accounts of the transfusion of the vagrant into the felon character, abundant proofs of the interchangeableness of their habits.

When the Legislature shall have settled the degree of vagrancy which will bring the detained offender within their Act, it may be well presumed that such an individual will lose no caste by being placed in company with the thief. The testimony of persons entirely distinct from benevolent institutions, of witnesses in this respect wholly disinterested, will attribute to vagrancy the most violent dispositions and most heinous crimes. Let these two classes, then, be submitted to

the same crucible, visited with the same philanthropy, fed at the same table, trained to the same measure of labours, provided for from the same treasury. But how long is this benevolent confinement to endure? It would appear, that at Mettray the elements of education are spread over several years. Mr. Hamilton observes, "Generally until the age of sixteen." The length of duration, although productive of a slight increase of expense, is part of the system of reform. "The average of relapses," says Mr. Hamilton (p. 31.), "is six per cent.; it would be less were it not sometimes necessary to restore to liberty children scarcely twelve years old." The state of our own criminal law displays the inconvenience of short sentences in a conspicuous light. If we were to abide by the present catalogue of our punishments, the school would not have a fair trial. Undeserved censure would cripple its usefulness. The child would return too soon to his wretched home, destitute, half-weaned from transgression, ready to relapse. We appreciate, but must not confide too much, in the amiable applause which fell to the share of Mr. Thomson, of Banchory, in 1851, when he spoke of instances where "the saving knowledge of truth obtained at school had been communicated to the outcast parents through the little child." The experience of this gentleman did not lead him to affirm the inexpediency of the restoration to home. But in his institution the children only returned *for the night*; on the next morning they were again in training; and this circumstance undoubtedly presents a material distinction. Still that which may triumph in Aberdeen may not make way in London. The Scotch are more precise and not less persevering than ourselves. There may be some difficulty in adapting the principle of mere vagrancy (the cases at Aberdeen were those of vagrancy) to that of theft and habitual mendicancy.

It is our conviction that a dishonest child is affected with a moral plague. Some time must be suffered to go by before the plague-spot can lose its virulence; and it should, therefore, be made lawful for the authorities to commit, at their discretion, for a period far exceeding our vague and senseless terms of imprisonment. It may not be desirable to copy the

long imprisonments of continental nations, but a moderate mean, sufficient to answer the rat a system, without breaking in upon the libert land is, with justice, boastful.

One word as to age. In any statutory po the magistracy, there will probably be a lim of life when the juvenile is competent to be r

The first Act of Victoria upon this subjec teen years, the second of sixteen. It is not will be a disposition to enlist children who ha teen years. Few lessons are better ratified by the necessity of separating the elder from the In every place of instruction the existing ev from the seniors. Nevertheless, a lad of fou be considered on the whole a dangerous senic ten, well trained in mischief, may be an ove panions far beyond his own age. Nor is i retort that the boy of ten is sometimes, fron of tactics, of equal calibre with one of sixte and treachery. Whatever may be the clever cunning, it may be too much to affirm, that imum of bad attainment can square with the the strength, of the advancing man. And forgotten, that the power of expulsion from institution will scarcely escape the hand wh pointed to draw the new Act. Whether t ten, or twelve, or of fourteen years, the right incorrigible, if occasion should offer, should, reserved. Whether the unreformed crimina mitted to his former sentence,—that is to say emergency he should be dealt with “as thou not passed;” whether he should be discharge the wide world, — “with all his sins and imp head;” — whether he should be translated to a to a Parkhurst, a Woolwich, a Norfolk Island- here to inquire; that catastrophe, which we rare as painful, does not belong to the pr We contend that, uncommon and sad as the be, care should be taken to invest a Refor

with a legal capacity to declare, by their expulsive sentence, that "This child shall no longer be one of us."

That peerless topic, the mode of raising money for the schools, the marrow of the whole subject, remains for consideration. But we must just touch upon some supplemental words of a resolution passed at the late Conference. Sufficient time is to be allowed for the reformation and industrial training of the children, "or until satisfactory sureties be found for their future good conduct." It is evident that the guarantee is not to be required before the Bench upon committal to the school." It must come into contemplation, after a child has been successfully treated at the institution, and is thus qualified to become an apprentice or other useful labourer. But who is to become the surety? What penalty is to mark the breach of the bond? What authority is to be put in motion to vindicate the broken condition? A moral suretyship is not intended. It is, at least, very imperfectly described, if it be so meant. The magistrate, when he delivers over the criminal to the house of discipline, must be satisfied that the term of probation will be fulfilled, or that the guerdon of a proper surety will be secured. How is this latter requisition to be verified? Unless some provision be made on this behalf, an irresponsible body will have the power of superseding the law. They may exercise their functions with discretion; but the suretyship being found, the offender is discharged from his sentence. We have no doubt that this matter may be satisfactorily settled by the new Act, but we cannot do otherwise than call attention to the nature of the security, and the power of enforcing its conditions.¹

The indemnity against the costs of the infantine establishment is threefold: —

1. Local taxation.
2. Government aid, with Government inspection.
3. A proportionate contribution from parents.

The local tax would probably be a charge upon the poor-rates.

¹ The st. 3 & 4 Vict. c. 90., referred to at the meetings, and which we cite merely by way of analogy, provides expressly that nothing therein shall interfere with the execution of the sentence passed upon the infant.

The Government grant would, perhaps, be a vote from the Consolidated Fund. The parental impost might be regarded in the light of a private Improvement Rate. This arrangement embraces a double financial burden: it operates as a local rate and as a general tax, since the Consolidated Fund, or indeed any independent grant, must be satisfied from the public purse. But there was an element at the Conference of 1851, at all events, which revealed another source of support. Mr. Thomson, Chairman of the Aberdeen County Prison Board, said, in the course of his address: —

“I do not desire that the Government should undertake the whole charge and burden, for I think it will be the most fatal step they could take for the schools. (Hear, hear.)”

Again, by the same gentleman: —

“The Local Committee should be entitled to look to the public funds for a certain determinate proportion of the expense; but the whole carrying-on and working of the school should be left to the unfettered energy of the subscribers and supporters, Government only exercising the right of inspection, as at present in schools partly supported by grant from the Privy Council.”

Now we are not disposed to offer any formidable objection to the local rate. It should be made appear, nevertheless, that this domiciliary taxing will give promise of a permanent advantage. Unless this were so, and although the Northerners are well inclined to a tax for education, it may yet be questioned whether the country at large will hail with complacency an addition to parochial demands. But it may be suggested to the practical men, who will inevitably regard this question in a financial as well as philanthropic light, that the diminution of cost in maintaining criminals before and after trial in our prisons must afford much relief to the County Rate and government allowances. The reports teem with illustrations of this truth. We take one at random: —

“The children committed for the first time in July 1844 (pursuing the same mode of calculation),” *i. e.* by imprisonment, prosecutions, plunder and destruction of property, and maintenance in Unions), “have, in five years, cost 4000*l.*; and those committed for the first time in 1845, have already cost about 2000*l.* Now, in the Returns laid before Parliament, on the motion of Mr.

Monckton Milnes, M.P., it appears that there were in 1848 and 1849, throughout the country, no less than 7000 first committals of persons under 17 years of age. But I will take them at 5000, and, assuming that Bath presents a fair average of cost, the amount lost to the country, or expended on these children alone who are committed for the first time, is half a million per annum. That is a startling assertion certainly; but it is fully borne out by the statement as to the cost of juvenile crime, made by Mr. Serjeant Adams, Mr. Rushton, and other witnesses examined by the Select Committees of the two Houses of Parliament."¹

This is a quotation upon a dry subject, but it is a sample of the calculations made with reference to the cost of allowing infant growth to vegetate in the wrong direction. Again (we cite without discrimination): —

"Liverpool has one of the largest gaols in the kingdom. The commitments during last year were upwards of 9500. Of that number, upwards of 1100 were juvenile offenders, under 16 years of age; and of these the proportions of recommitments amounted to more than 70 per cent."²

Another: —

"We have [then] the choice of making one of these children an honest and virtuous member of society for 25*l.*, or of sending him ultimately into a penal settlement, at a cost, including his previous training in crime, of 300*l.*"³

If such figures as these can be at all ratified (and it will become the duty of the Government to be well satisfied of the fidelity of such calculations before they sanction a grant or a rate — *à fortiori*, before they yield to both), a local tax, unpopular as it may be, yet subjected to the working machinery of the Poor's Rate, may be more cheerfully submitted to, as a hopeful experiment, than we might be disposed to imagine.

Still there is one material point bearing upon this matter which seems to have been overlooked. We are confident that the path of this reform will be made more easy by the introduction of summary convictions for small thefts. We

¹ Conference of 1851, p. 33. Speech of the Rev. W. C. Osborne, Chaplain of Bath.

² Conference of 1851, p. 62. Speech of the Rev. T. Carter, Chaplain of the Liverpool Gaol.

³ Speech of A. Thomson, Esq., of Banchroy. Conference of 1851, p. 83.

would have the brand of felony removed from *all* stealings committed by such as act "*without discernment*" — in other words, by the disciples of the new House of Refuge. If a Reformatory School did not exist, even if it should fail, the diminution of cost to the County Rate would be proportionably of importance. But the institutions do exist. We do not, cannot anticipate their failure; and, in that case, you will have no felon school; you must obviously economise largely; the business at sessions will clearly demonstrate the promised relief; the small addition to the rates will be cheered rather than deprecated.

With every feeling of homage to the Chancellor of the Exchequer, a licensed grumbler by reason of his office, we think he should not scruple, nevertheless, to give an aid of 100,000*l.*, or an annual benevolence, without repayment, towards this great work. We expect that the revenue will sustain no loss in the end. Mankind at large will scarcely be affected by the gift, even if it should be an annual bounty. The friends of improvement will doubtless hail it with gratitude.

We now approach a more difficult section of the subject. One of the late resolutions affirms, "That as a check to any possible encouragement offered to parental negligence, a portion of every child's cost of maintenance at a Reformatory School should be recoverable from the parents." There are many grounds for argument in favour of this decision. Not the least would be the adhesion of men of benevolence and of considerable experience to it. A plausible reason would be the facility by which parents could father their offspring on the public fund. They might ill treat their progeny with a view to drive them forth as candidates for an establishment which to themselves would be inexpensive. They might even contemplate the benefit of a free education. The labouring class are not disturbed by a sense of delicacy. The charity of well-meaning people has long since extinguished the bold pride of our ancient peasantry. "A poor man," said Dr. Johnson, in his day, "has no honour." There are exceptions; but it is not improbable that if a parent were harassed with an unquiet family, he would quarter them

upon a free school; if he writhed under the misconduct of his children, he would hasten to an abode where the service of reform would be gratuitous; if his share in plunder declined in quantity, he would recklessly bestow his providers upon an eleemosynary house. The claim upon his pocket, on the other hand, would be a proceeding *in pœnam*; he might use his efforts to hinder his infants from coming into an institution which would involve his circumstances; he might prefer to keep them honestly (if he could) within his own dwelling rather than that they should become the pupils of the State. These and other considerations might influence an untaxed parent to burden the community with his negligence, or a taxed to assume an appearance of virtue in order to escape the consequences of vice.

The late Sir Robert Peel once contemplated, in the case of poachers, that parents should be held responsible for the excursions of their children. But he was compelled to abandon the scheme. It might have occurred that a moral population could not become security for the vice which had been common in their neighbourhood from unknown time; that the wages of agricultural labour were too small to warrant their being visited with pecuniary penalties: in a word, the project was not carried out. But we think that if a man in a populous district is in the receipt of 25*s.* to 40*s.* a week, he cannot, theoretically speaking, be held guiltless if he does not exhaust every endeavour to keep his family from disgrace and wrong. If he be not ignorant, he is culpable and unkind. We are not, however, prepared to say that a rate should be imposed upon the workman who earns no more than 12*s.* to 14*s.* We presume that it was not the intention of the Conference to impose a rate upon the labourer with small ways under any position. A man of slender means is liable to difficulties which in a great measure benumbs his moral sense. The Wiltshire hind, with a pittance of some few shillings by the week, in the midst of dear bread, scarce fuel, an inclement atmosphere;—must coldly, indeed, view the face of a public collector, if he should demand a penny in the pound only as his tax. Even the more prosperous man of Birmingham or London, stung by the misconduct of some

profligate stripling, might reflect, and with that many sons of the rich are permitted to swing of riotous folly, and yet that their conduct is grievous, and mischievous to society as it draws their fathers into this category of financial profligates, there can be no inquisition to be drawn between the wages of labourers. The fact often appears in the rate-book. The act of tenements has even removed the excuse which have adopted the statute; thus without standard by which the better paid labourer is more easily pointed out. When practising to draw a new Criminal Reform Bill, it is often that they will pause before they recommend a law universally on parents for the dishonesty of their children. And admitting, as we do, that cases would be plentiful of earnings and inexcusable neglect and extravagance were in union:—an immense aggravation of poverty, vain struggles to govern rightly and to educate mothers, would weigh down the opposite side of the scale. An obliquity of intellect, which is familiar to the agents of good who seek the dark habitations of their benevolent pilgrimages. Perhaps it is to try the plan of a partial assessment upon a single instance, *in London only*. London is a place where weekly wages are received, where fluctuations of wages are not so sudden as in some districts. Likewise, the larger amount of concentrated wealth may be discovered amidst profligate plenty. Should work well, it can be easily extended to other districts. It can be, without much difficulty, withdrawn. The arrangement may be satisfactory to all and hardly be objected to as an experiment by those who feel quite convinced of its propriety: it is a concession to the views of an influential meeting. In some instances there is ground for expectation that the licentiousness of extravagant and well-to-do persons will be repressed.

We rejoice to be able to congratulate them on their grand confederacy to repress juven

grancy. We delight in the prospect of an immediate delivery of the vagrant by the magistrate to a place which savours little of the gaol. We trust that Government will crown the young effort with their countenance, and that the people will not grudge their pence to redeem an outlay at once moral and remunerative. We heartily concur with the majority, that there shall be no preliminary punishment; and we hope that the suretyship will be found capable of an interpretation different from that which we have given, and that the tax upon parents will be adventured, in the first instance, upon a restricted scale.

Mettray has had a strong testimony to its value for a time sufficient to warrant an opinion of its merits. Mr. Brandbridge (Conf. 1851, p. 93.) spoke of it in terms of compliment, referring also to a Berlin Pentonville Prison, to the Rauhe Haus at Hamburg, and to other model institutions. Lord Lyttleton, at the Conference of 1853, spoke of Mettray and the Rauhe Haus: "the last named being, he believed, the very best of all." Mr. Hamilton's account of Mettray¹ is before us, and in conclusion of this Article we will very briefly allude to the condition of that establishment, and its results. Mr. Hamilton's description is worthy of attention. As chaplain of Durham gaol, he seems to have turned his mind to that important matter, moral statistics, which those who read his provincial reports will find not to be unnoticed. He relates of Mettray:—

"On arriving at Mettray, the détenu is placed in a family [that is, a separate house of children], and employed in agriculture or in a workshop, regard being had to his age, his strength, and, as far as may be, to his particular capacity. The child also undergoes a sort of examination as to his relatives, the cause of his being brought before the Court, and other details of his short but often unfortunate history. These statements are committed to writing in a tabular form, and completed by successively recording all that concerns each colonist, his sojourn at the Colony, his conduct, and his position after leaving it. The information thus obtained is

¹ A new edition of M. Cochin's pamphlet, published in March, 1853, and the annual Report of Messrs. De Metz and De Bretignières de Courteilles, supply additional and very recent information respecting the Colony of Mettray. Account, &c. Addenda, p. 39.

already remarkable, and will hereafter form a valuable moral statistics."¹

The every-day life is described as follows:

"Half an hour for breakfast and recreation, then one hour for dinner and recreation. In summer, heats, two hours at school, after which four hours in winter, on the contrary, four hours of work, at school by candlelight. One hour for supper and at 9 o'clock, bed." (p. 23.)

The boys are collected in the morning trumpet—a kind of military order prevail compelled, as English citizens, to a service. French customs; we have said, in a former founding institutions, the genius of each is respected:—

"Agriculture is the chief industrial employment. Last year about 500 acres were farmed by the first only cultivated 29½. When work cannot be done in fields, the boys break stones under sheds; they are lifted for employment on roads, and as road surface 984 yards of road surface were made by the Col-

It is obvious that some other instruction in breaking must have been given, in order to the surveyors of highways. The account then of the cultivation of mulberry trees and breeding of then goes on:—

"A certain number of boys are employed in husbandry, which is too much neglected in France; it would appear sufficiently value an occupation from which we can obtain vegetables,—that is to say, one half of our ordinary food."

"In order to show the other trades followed, we cannot do better than copy a list of them from the report. Of 550 inmates were then 319 agriculturists, 13 cartwrights, 13 smiths and horse-shoers, 28 joiners, 40 tailors, 24 shoemakers, 4 masons, 30 sail-makers, 12 in the service of the establishment."

¹ Many years since, a record of the future fate of each of the National Schools at Bath—a most praiseworthy act on the part of the authorities—maintained that hold on the domestic history of after life.

The employments on Sunday are not forgotten : —

"At the central prisons, Sunday employment is a great source of embarrassment to the Directors; at Mettray every hour of that day is usefully occupied." (p. 26.) "It is also on the day of rest that exercises of vocal and even instrumental music take place. The excellent influence of music is experienced at Mettray." (p. 26.)

We come now to the punishments. But they are well tempered with *rewards*. Justice is not for ever displayed as a stern avenger. In prisons it may be said of justice, "*Toujours faut il qu'elle frappe, il ne faut pas qu'elle caresse.*" Moreover, Mr. Hamilton tells us of the punishments : —

... "Effacing the name from the Table of Honour. Placed under restraint. Hard labour. Black bread and water. Confinement in a lighted cell. Confinement in a dark cell. Returned to the central prison. Of all these punishments the Directors remark that confinement in a cell is the most efficacious; those subjected to it are employed in making nail-heads and chopping up wood, which keep their legs and arms in exercise, or they break stones when let out during a part of the day. The English *treadwheel* and *crankwheel* are rejected as odious contrivances, which, as prisoners say, waste their activity in *grinding air*." (pp. 27, 28.)

Not one word of the lash. "*Je n'aime du sabre que le branchant,*" said the French soldier. We do not mean to lay it down as an opinion to be adopted, that there shall never be a corporal punishment. But we beg to decline any communion with sentiments which we have seen in print. That "there were many persons with whom there was but one way to the brains, and that was through the skin." The solemnity of a whipping, and the verdict of a boy jury, and the refined philanthropy which finds out a selected victim (like the men of old in the Recorder's Report), are amongst the admirable creations of modern times. But we are not quite converts to the new system. There is no flogging at Mettray. We are not aware of any other Reformatory schools here. So far from holding that the lash should be inflicted with stately ceremony and beat of drum, with all the coldness of philosophy and absence of feeling, we are half disposed to look upon corporal pain as a weapon of self-

defence. We hasten to explain:—If a spirit be so incorrigible (and such there are) as to menace the tranquillity of the institution,—remonstrance and kindness having been exhausted in vain—we would, before expulsion, take to the whip, as a protection against the unruly rioter. To beat for ignorance or incapacity is unwise, if not cruel; to chastise an offender in the act of rebellion might awe him into silence, and postpone, at least, the turning out of a helpless outcast. The repeated corrections of hardened boys by the public officer has been as often found to aggravate their callousness: the rapid visitation, on the spot, of refractory rebels, has not, we think, had a fair trial. But this power must not be wielded by men like our present parochial educators. The *disciplined* tutor of the new school can alone be entrusted with a mission requiring at once temper and resolution.¹

Let us turn to the rewards at Mettray:—

“Emulation is fostered by allowing the boys to assign to one another places of merit. A kind of competition is also established between the different families, by rewarding those in which no punishment has been incurred for a week. But the principal encouragement—that most highly valued—is having their names inscribed on the *Table of Honour*; a distinction which can only be earned by passing three months without punishment.” (p. 28.)

We close the review of this pamphlet with the briefest summary of the results of the Institution. The number of children admitted is returned at 1553 (p. 31.), (probably in thirteen years (p. 29.), 856 had left (1852):—

“Of whom upwards of 633 have been placed in situations, or been restored to their families; 223 are in military service; 185 in the army, and 58 in the navy. Of those who have left the Institution 708 are irreproachable, 47 conduct themselves tolerably well, 16 have been lost sight of; 85 have relapsed. The average of relapses is 6 per cent.² it would be less were it not sometimes necessary to restore to liberty children scarcely 12 years old. The statistics of criminal justice do not give the number of relapses of

¹ Moderate violence likewise, it should be remembered, is more congenial to the English spirit than short food and dark cells.

² “From a very careful analysis of the whole number who have left the Institution, it now appears that nine and a half per cent. have relapsed,—eighty-four out of eight hundred and fifty six.” (*Addenda to the Account, &c.* p. 39.)

juvenile offenders from the central prisons. It may, however, be stated, that in Wurtemberg, where 1800 children are kept in orphan-houses by the State, the average of those that turn out ill is 25 per cent." (p. 31.)

These data afford rather a salutary lecture against personal castigation. The untameable resolution of the English people, especially in their own land, alone induces us to the belief that the power of the strong arm should be reserved to prevent confusion. And we dwell upon the point only because we foresee a discussion which will be the result of much diversity of opinion; and we are desirous of recording our conviction, that although the corporal stroke may be tolerated, the infliction of it, in a well-regulated house, will, of necessity, be most rare.

We take our leave of Mettray with the word, England! go and do thou likewise.

The constancy of Villiers, the addresses of Cobden, the clear sight of Peel, have mitigated the harvests of scarcity, and doubled our years of plenty. The lamented statesman who set his soul upon the new Corn Law, assured to posterity an abundance of the necessaries of life. The emancipation of our commerce and navigation was the fruit of the same great principle. Our next aim should be the moral distribution of this magnificent bequest. The right education of the young will go far towards the performance of this sacred duty. A prompt attention to the Conference whose labours we have been reviewing, and to Mr. Adderley's promised bill, will be a good step towards the just apportionment of the gifts of Providence. We shall see at once the arrest of heedless waste and of intellectual ruin. We shall confer a boon which will bless alike the giver and the receiver — a benefit which promises the rare privilege of returning the full financial measure of its outlay. The charge of Utopianism has failed. The field is ripe for the workman. The inappreciable toils of Christian men have been the pioneers. It needs but a hasty visit to our cities to discover that mankind are softening. The mechanics' institutes, the societies for mutual instruction, the more civilised schools, the freedom of an unshackled press, are doing their works. Even with the tide of population, it may

be fairly contended that physical violence comparative decline. We should be en survey of our social state to urge the R untiringly upon the Government. We m behind our foreign neighbours — no longe for satire —

“Hæc igitur est tua disciplina? si
Instituis adolescentes?”

We end with a caution which we trust ,
criminated. If this Reformation should b
a want of judgment, it may produce the in
of criminal pauperism, cherished at the S
by funds wrung from honourable indust
marked by moderation, and the power o
somesely in case of a reverse, there may b
incalculable moral and social gain.

ART. X. — THE CITY OF LONDON INQUIRY.

THE reform of the municipal corporation
and adapting them to the exigencies of
has been a lengthened task. Twenty y
jority of the Municipal Corporation Comi
that they “found it their duty to represe
ing municipal corporations neither posse
the public confidence or respect, and th
form must be effected before they could l
efficient instruments of local governme
Palgrave, in his protest against this rep
Commissioners, was compelled to admit t
other portion of the policy of the realm l
adapted to the progress of society, the
municipal law had been wholly neglected,
corporations were labouring under the inc
tutions which had ceased to harmonise

system of jurisprudence; and the influence of privileges and immunities which, however injurious they might have become, had, nevertheless, been created, protected, and fostered by the law."

On the recommendations of this General Report of the Commissioners the Municipal Corporation Reform Act was passed in 1835, but it did not affect the Corporation of London, which was specially treated of in a Supplemental Report in 1837, from the same Commissioners, who made a great number of recommendations, none of which were acted upon. The Commissioners, however, dwelt at some length on a peculiar power of internal legislation possessed by the Corporation of London, enabling the mayor and aldermen, with the assent of the commonalty, "where any customs theretofore used and obtained proved hard or defective, or any matters newly arising needed amendment, to apply and ordain a convenient remedy, as often as it should seem expedient;" — a peculiar feature in the constitution of this ancient corporation, which, as it has been considered to justify very sweeping measures of reform and renovation without the aid of an Act of Parliament, has been often urged as an argument against any interference on the part of the supreme Legislature. One thing, however, is quite clear, that from the publication of the report in 1837 to the issuing of the Commission whose inquiries are now pending, very little has been done by the Corporation itself, and nothing by Parliament, towards the adaptation of the municipal institutions of the City of London to the wants of the present day.

The Corporation of London and the ancient liberties and franchises of that city, have ever occupied a large share of public attention, and they have now been made, by means of the pending inquiry, subjects of immediate interest. This ancient corporation seems at length fairly to be placed on its trial. The Commissioners have already examined witnesses favourably and unfavourably disposed towards its present constitution, and heard the opinion of gentlemen, some of whom, at all events, may be fairly presumed to be free from bias on the subject. It has been urged that the Corporation

of London, as at present constituted, is in this day for the municipal wants of the great name it is identified, although the charge of nepotism, inefficiency, &c., which have been its members, may be wholly without foundation. The Committee of the Common Council has, by the Corporation, sent in a formal document by the much talked of *Guildhall accounts* have been laid before the Court; the charters of the City, hitherto exposed to public view will, we presume, also be made and it may at last be considered as a fair question in what manner the Corporation of London, its revenues, is to be reformed.

This ancient body, it must be remembered, has enjoyed a peculiar *immunity*. The franchises of London, which form so prominent a feature in our letter law books, are stated by grave authorities with such force that they will avail against the Crown, or even the general provisions of a statute of Parliament, with all its power, has hitherto been unable to deal with them, and even where the usual provisions of their favour is omitted from statutes creating new franchises in the law, the effect of the doctrine that the ancient franchises and customs of London remain unaltered.

A consideration of the origin and early history of these franchises will serve in some degree to show how they came to be regarded with so much solemnity. From the footing of this ancient claim to immunity from parliamentary change, they were from the time of Henry the Confessor to the Act for the abolition of feudal tenures so often gravely treated, both in Westminster Hall and St. Stephen's, as forming a part of the City's liberty.

The time-honoured City of London, like the Corporation which flourished under the auspices of Imperialism, is to have actually constituted, during the

¹ See on this Viner's *Abr. Statutes*, E

obscure period of the Middle Ages, a species of independent self-government, contrasting by the comparative enlightenment of its municipal institutions, with that dark feudal system, whose iron chains bound down the Nations of Europe to the exclusive service of warfare or the priesthood. When, therefore, at the dawn of civilisation in the eleventh century, the middle classes combined for their mutual protection and the pursuit of more humanising vocations; when each borough and town sought and obtained from its feudal lord a charter of liberties for itself, London and other ancient cities, whose franchises could yet be traced back to a period preceding the dark ages, naturally came to be regarded with peculiar veneration; and the citizens strengthened by popular sympathy, claimed *as a right*, what the chartered municipalities gained by feudal grace and favour; and when, at a subsequent period, the sanction of the Crown was sought for these ancient liberties, and the free cities which possessed them merged into municipal corporations, the Royal charters as in the case of those of Edward the Confessor and of William the Conqueror to the City of London, simply, confirmed the ancient franchises in general terms, or as in the case of the charters of Bourges, Marseilles, Arles, Toulouse, and other French cities, expressly recorded the fact that the rights and privileges which the citizens claimed were a continuance of the Roman municipal system.¹

This recognition of the antiquity of the franchises claimed, was of no small consequence when questions of forfeiture were so likely to arise, and the practice of resumption of royal grants was so frequent; and the national importance that was attached to the ancient liberties and franchises of London, may be estimated by the fact that it was made an express provision of Magna Charta itself, that the City of London should have all *its ancient liberties and customs*; and bearing in mind how sacred these franchises were generally regarded, and, at the same time, how powerful the old citizens of London were, both in point of wealth and political influence, it is not surprising that the immunity thus given to their

¹ See repeated instances of such charters in Raynouard's *Histoire du Droit Municipale de France*, t. ii. pp. 183—190., and M. Guizot's *History of Civilisation in France*, lect. xvi.

peculiar franchises should have been so often confirmed, preserving up to our own time, with little material change, a system of municipal regulations and local customs peculiarly adapted to the London of the thirteenth century.

From the time of King John to the reign of William and Mary, there are a regular series of charters and statutes, whose avowed object it is to ratify the municipal powers and confirm the franchises and customs of the City of London. These statutes and charters, it should be observed, however, were most of them backed, not only by the political influence of the Corporation, but, generally speaking, by a liberal advance of sterling coin from the City coffers. Thus, the good citizens gave to Richard I. the large sum of 1500 marks for preserving their liberties; and by one of the *oblata* rolls of King John, it appears that the citizens gave to the *Lord the King* 3000 marks, for having their liberties confirmed by his Majesty; and the roll goes on to state, in most unequivocal language, that the charter of confirmation “shall be delivered to *Jeffry Fitz-Peter* on these terms; that *if they will pay those 3000 marks, they shall have the charter, but if not, they shall not have it.*”¹ STOW observes, that “in 1392, King Richard the Second took ill-will to the citizens because they would not lend him 1,000*l.*; finding, therefore, somewhat to charge them with, he imprisoned the mayor, with the aldermen, and took from them their privileges, which, afterwards, they redeemed at 10,000*l.*; and, besides, gave him another 10,000*l.* for his entrance into the City, and with many jewels as a crown, and another to the Queen.”² Proceedings like this of King Richard the Second, which soon brought to a full stop the career of that wretched monarch, seem, so far as the City of London is concerned, to have been over and over again substantially resorted to by more fortunate and less unpopular monarchs, unable, however, to withstand the temptation of the easy process of a seemingly legal proceeding by *quo warranto*, to frighten the City authorities into an application for fresh charters, and

¹ See the Roll published by the Record Commissioners, “*Rotuli de oblatis, Joh.,*” memb. 20. p. 11.

² Stowe's Survey, lib. v. c. 35. p. 456.

the payment of a seasonable pecuniary contribution to the royal exchequer. The industrious Stow gives a list of the large sums paid by the City at various times for the confirmation of their charters.¹ The famous *quo warranto* of Charles the Second was a fortunate event for the Corporation of London. The judgment against the City, valid or not, as it might be, by Common Law, was formally reversed by Act of Parliament, which provided —

“That the mayor, commonalt and citizens of the City of London, shall, for ever hereafter, remain, continue, and be, and

¹ The account of these purchases of City privileges from the Crown, as given by the learned Town Clerk, is as follows: —

GRANTS OF MONIES TO THE CROWN FROM 1139 (4TH OF STEPHEN) TO 1487
(18TH EDWARD IV.).

1139.	Stephen	-	-	100 marks of silver for permission to choose their sheriffs.
1158.	4 Henry II.	-	-	£1,043 gift.
1159.	5 Henry II.	-	-	1,000 marks donum.
1170.	16 Henry II.	-	-	£666 13s. 4d.
1172.	8—19 Henry II.	-	-	£666 13s. 4d.
1197.	9 Richard I.	-	-	1,500 marks.
1250.	1—35 Henry III.	-	-	600 do.
1256.	40 Henry III.	-	-	3,000 do.
1267.	8—52 Henry III.	-	-	20,000 do.
1270.	54 Henry III.	-	-	{ 100 do. 500 do.
1307.	8—1 Edward II.	-	-	{ £1,700. £1,000.
1314.	15—8 Edward II.	-	-	600 marks.
1319.	12 Edward II.	-	-	1,000 do.
1322.	15 Edward II.	-	-	2,000 do.
1339.	12 Edward III.	-	-	20,000 do.
1371.	44 Edward III.	-	-	4,601 do.
1383.	4—7 Richard II.	-	-	4,000 do.
1478.	3—18 Edward IV.	-	-	Charter granting package, carriage, portorage, garbelling, and gauging, and coroner, in consequence of the City releasing a debt due from the Crown of £7,000.

Another charter respecting mortmain, in consequence of the City releasing a further debt of £1923 9s. 8d.

1640. 1—16 Charles I. - - Charter respecting portorage £4,200.

The learned Town Clerk seems to have made up this list from the notes to Mr. Norton's book on the Charters of London. The list is *not quite accurate*. Stow has a much fuller and more detailed account.

prescribe to be, a body politic, in *re facto, et nomine*, by the name of 'mayor and commonalty and citizens of London,' and by that name, and all and every other name and names of incorporation, by which they at any time before the said judgment were incorporated, to sue, plead, and be impleaded, without any seizure or forejudger of their franchises, liberties, and privileges, upon pretence of any forfeiture or misdemeanour heretofore or hereafter to be done, committed or suffered; and shall have and enjoy all their rights, gifts, charters, grants, liberties, privileges, franchises, customs, usages, constitutions, prescriptions, immunities, markets, duties, tolls, lands, tenements, estates, and hereditaments whatsoever, *which they lawfully had* at the time of the recording or giving of the said judgment."

The civic franchises and customs can now, therefore, as already observed, only be effectually dealt with by an express statute, and, having been so often confirmed in general terms by Parliament, it has been uniformly insisted on, that, in any general change of the law which Parliament may be called on to make, the ancient franchises and customs of the city must be left intact, and the citizens exempted from the operation of the proposed reform. To further secure the immunity of the City franchises, the Corporation have an officer called the City Remembrancer, whose province it is to watch every Bill brought into Parliament, in order to see that the Civic privileges are not covertly invaded. The duties of this officer, to use the language of Stow¹, are "to attend the Lord Mayor on certain days to put his Lordship in mind of the select days when he is to go abroad with the Aldermen, &c., and to attend Parliament daily during every Session in order to report their proceedings to the Lord Mayor."

We presume that the labours of the worthy officer as flapper to the Lord Mayor as to his civic engagements, are not very arduous; but the interference of the Remembrancer in the business of the Parliamentary Session is really of a very important nature, and, as we conceive, serves at this day as no trifling clog on the cause of law and other reforms. Up to the fifteenth century, the principal conflict between the privileges of the City and the general Acts of the Legislature arose out

¹ Stow's Survey by Seymour, lib. 4. c. 3. p. 94.

the fertile question of the freedom of trade. The claims of commercial enterprise to be emancipated from merely vexatious restrictions, prevailed in inducing the Legislature to concede them generally to foreigners as well as natural-born subjects. The City of London, however, by a series of charters and statutes up to the reign of Henry VII., secured a reservation of their own exclusive privileges. After this reign we know a great variety of reforms were introduced in the general law of the land, effected by express statutes. Whenever the bills for these measures of reform were under discussion, and any of the clauses appeared to conflict with the local customs or franchises of the City of London, it became the practice for a saving-clause to be introduced in favour of the civic rights, liberties, and privileges, and a great many statutes, both public and private, will be found to contain this provision. It would be an undertaking of no little labour to give anything like a correct list of these *saving clauses*. The Acts of Parliament relating to the cases of apprentices¹, orphans², wills, enrolment of deeds, intestate estates³, &c., contain such clauses; and, as modern examples, we need only cite the Municipal Corporations Act, the Metropolitan Police Act, the County Courts Act, the Lodging Houses Act, the Health of Towns Act, &c.

The business, however, of a Parliamentary Session is now somewhat different from what it was two centuries ago. To master the contents of the five hundred bills which are annually brought into Parliament, is a work which few individuals have either capacity or leisure for. The City Remembrancer, as of yore, still has a place assigned him, in order to hear the debates in person.⁴ Fifty bills introduced into Parliament last Session, according to the evidence of this ancient city officer, directly or indirectly affected the sacred franchises of the City. To oppose, or, at least, to

¹ 49 Geo. III. c. 39.; 54 Geo. III. c. 96. s. 4.

² 13 Hen. VIII. c. 8.; 12 Car. II. c. 24. s. 10.

³ 22 & 23 Car. II. c. 10. s. 4.; 1 Jac. II. c. 17. s. 8.

⁴ The Remembrancer of the City is by the usage of Parliament entitled to a seat behind the Sergeant of the House of Commons, which gives him access to members of Parliament in a very convenient manner.

watch all these, to take his part in the ceremonial and festive doings at Guildhall, and to effectually solicit the proceedings initiated on behalf of the Corporation, the City Remembrancer has, at all events during the sitting of Parliament, enough to occupy his attention. He must, in fact, trust a good deal to others, in order to ascertain which of the five hundred bills of the Session require his peculiar attention. Sometimes, as in the case of private bills directly dealing with the City rights or property, or assumed monopoly, he receives express notice, and the bill is opposed or compromised in the same way as a railway bill by a rival company. In this way has the Corporation successively dealt with the Dock Acts, the Water-Companies' Acts, and all Acts for establishing markets of any kind within seven miles of London.¹ Sometimes, as in the memorable instances of the Bills for Corporation Reform, establishing a Metropolitan Police, and getting rid of the nuisance of Smithfield, the tocsin is sounded for uncompromising hostility, the *war estimates* are made out, and the cry of *privilege* brings all the available forces of Guildhall into the field.

It may be well imagined, however, that it is often a puzzling question to the worthy Remembrancer whether a Bill apparently harmless may not indirectly disturb some dormant right, liberty, custom, or privilege of this venerable city; and so, to avoid danger in such cases of doubt, the City Remembrancer resorts to the easy expedient of getting a clause inserted to the effect that, "nothing in this Act contained shall prejudice or affect the rights, privileges, or franchises of the City of London."

So jealously, indeed, is this duty of the City Remembrancer followed, that Mr. Sturges Bourne's useful Act passed thirty-five years ago, for the regulation of Parish Vestries, was, by an express clause, declared not to extend to the City of London², though it is not very easy to see how the City

¹ The Corporation of the City of London enjoy, by virtue of a Charter in Parliament, the privilege of preventing the establishment of any market within seven miles of the City. See *in re* Islington Market Bill, 3rd Cl. & F. 518. This privilege was much insisted on in the case of the Smithfield Market Removal Bill, in 1851.

² 58 Geo. III. c. 69. s. 9.

franchises could have been jeopardised by the parochial vestry meetings within the City, as elsewhere, being subjected to a general law.

In obtaining these peculiar exemptions at the hands of the Legislature, as well as in urging through Parliament what are called *City Bills*, *i. e.* bills by which advantages are secured to the Corporation, the City authorities have long been deemed to possess a more than ordinary influence. The system of direct purchase of corporate rights, it is probable, terminated many centuries ago. In a memorable instance, indeed,—that of the Orphan's Fund Bill, in 1694,—by which the Corporation, who had speculated with the trust funds of the City Orphans, and thus got into debt, obtained from Parliament, for their own use, a perpetual tax of 4*d.* per ton on all coal brought into the port of London, the Journals of the House of Commons record a formal resolution, happily unexampled in modern English history, “that Sir John Trevor, late Speaker of this House, being guilty of a high crime and misdemeanour, by receiving a gratuity of a thousand guineas from the City of London after passing the Orphans' Bill, be expelled this House.” But we apprehend it to be but common justice to the Corporation of London to regard them, even at the date of this disgraceful transaction, as not being necessarily more corrupt in their dealings, either at Guildhall or St. Stephens, than other corporate bodies.

A due consideration of the wealth and importance of such a body as the citizens of London, as well as a mere regard to the municipality of the chief city of the Kingdom, has, up to our own time, very naturally secured to this great corporation an influence in the proceedings of Parliament which no other city and no other corporation in this Kingdom has been suffered to possess¹: and the very fact that the ancient laws and jurisdictions of the City are treated by so many statutes

¹ The ordinary course pursued when the City wishes to oppose or promote a Bill in Parliament is for the Remembrancer to canvass officially members of the House of Commons on behalf of the City,—to have written statements laid before them,—and to get up petitions in support of them. With such facilities of *managing* the House, we can scarcely be surprised at the success of such schemes as the Coal Duties Bill so recently carried by the City of London.

as *beneficial* privileges and franchises, induces Parliament to deal leniently with them.

Evidence has certainly been given before the Commissioners, of a peculiar system of hired agitation, got up of late years by the partisans of the Corporation, for the purpose of upholding these privileges; and the newspapers record occasionally the particulars of a system of petty warfare carried on against individuals who take any part in pending inquiries which can be construed at Guildhall into a challenge of the right of that body of gentlemen to undisturbed immunity.

Whilst all this conduct has, for the most part, signally failed in securing the objects of its promoters, and served to bring great opprobrium on those who have been mixed up in it, it has, perhaps, for the time, obstructed the progress of municipal reform, but it has given great encouragement to the enemies of the principle of municipal institutions. Notwithstanding the rhodomontade that is talked by some of the *literary gentlemen* occasionally retained to cry up the policy at Guildhall, it may be safely asserted that the cause of *centralisation* and Government interference in local affairs (at all events in the Metropolis), has been more encouraged by the obstructive policy pursued by the municipal authorities at Guildhall than by any other cause.¹ Had the Corporation of

¹ The efforts made by the Corporation of London in opposition to Municipal Reform in 1835, are matters of history. The course taken by the Guildhall powers, in opposition to the Police Bill, is thus described by a witness examined on the pending inquiry, who is a warm advocate of the existing system at Guildhall: — "The Minister of the day, Lord Melbourne, brought in a Bill to unite the City police to the Metropolitan police. It was objected to by the Corporation. They petitioned the House of Commons. They saw that the Minister was determined. They then addressed the Crown, and a gracious answer was given: but they understood its nature. The Minister was still determined, and they then acted on the French maxim, 'Help thyself and Heaven will help thee.' They immediately fixed their Town Clerk in New Palace Yard; they gave him a large body of assistants, and instructed him to communicate with every corporation in the United Kingdom. The consequence was, by the influence of those country corporations, the Minister found that his support fell like a rope of sand. He gave up his measure, and the police of the City has been in the hands of Mr. Commissioner Harvey since that time." (§ 2682.)

The course taken by the City as to the Bill for removing Smithfield Market is still more remarkable. Certain *literary barristers* were, it seems, invited to

London taken the lead, as it ought to have done, in securing an efficient municipal system for the whole Metropolis, many of the existing Government Boards could never have been created at all. Who can doubt that, if for the absurd *trained bands*, and the miserable old watchmen so constitutionally kept up by the wisdom of Guildhall, a proper system of police had been provided for the Metropolis, the Metropolitan Police would now be subjected to a Government Board?

Could we say of Gog and Magog as of the good Old English Gentleman in the song,—“*While they feasted all the rich, they ne'er forgot the poor,*”—the wants of the deserving poor and sick of this vast city might still be administered to out of the inexhaustible funds placed at the disposal of the Corporation of London; and Poor Law Unions and Somerset House Commissioners might have had no occupation within the limits of the Metropolis; but the control of the police and poor, the sewers and local improvements, one by one, falling, by sheer neglect, into the hands of Government Boards, specially appointed for the Metropolis, the provision of dock accommodation, the supply of water and light abandoned to public companies, a large portion of the real municipal control of the inhabitants is already given up, and the Guildhall Corporation, by keeping up for the moment, in a small section of the Metropolis, antagonistic establishments of a necessarily less perfect nature, only serve to hasten their own decay, and the ultimate success of the very system of *centralisation* they affect so much to deplore.

Let us, in considering the *vested rights* of the Corporation of London, and their claim to immunity from Parliamentary interference insisted on at so great a cost of money and public convenience, carefully distinguish those ancient privileges, liberties, and customs, which the early charters and

take up the united cause of the Corporation and the butchers, and sums of money were awarded, by way of *honorarium*, for these services. Parliament, the press, and the public were all agreed on the necessity of the removal; but the Market's Committee, and their coadjutors, kept up an agitation for the *liberties of London*, and so the Bill was vigorously opposed; and though, of course, it became a law, it cost, in parliamentary expenses, &c., out of the property of the municipal funds of the City of London, the sum of nearly 6000*l.*, and an equally large sum to the Government by whom it was promoted.

statutes relating to the City so carefully protected, and which are so ingeniously thrust forward whenever questions affecting the Corporation arise, and those modern grants and modern acquisitions of "tolls, duties, lands, tenements, estates, and hereditaments" which really form the substantial subject of contest at present, and which make Guildhall something more than a mere depository of antiquarian records, and civic honours something more than imaginary.

There are, according to the evidence of Mr. Serjeant Merewether, upwards of 120 charters relating to the City of London; and the liberties and customs of this great City, Lord Coke observes, would *fill a whole volume*; but if we regard the bulk of the City charters, or the voluminous records of those ancient liberties and free customs, little will be found which could at this day fairly be deemed of advantage either to the general body of citizens of London or to the public.

The learned Town Clerk tells us, that the substance of the 120 charters is contained in the 49 charters which are already published, and in these, as in the list of the *liberties and customs* of London, we find a vast deal of antiquated provisions for securing the administration of justice in the City tribunals, whose jurisdiction is, by mere force of their rusty machinery, nearly gone to decay; a vast deal of protection afforded to the citizens against tolls and impositions which the law has, long since, wholly removed; and against arbitrary powers, and barbarous forms, which are luckily no longer known in this country: but to secure justice to the citizens, these ancient records show powers hardly less arbitrary, forms little more civilised—which it is far from certain may not, even at this day, be called into operation—as samples of the *ancient liberties and free customs of the City of London*.

Now it must be borne in mind, that when a general statute, silent as to the City of London, passes both Houses of Parliament, for effecting a reform in any branch of the law as to which there happens to exist a peculiar custom of the City of London, it is at least doubtful whether the statute will prevail within the limits of the City. It is laid

down in some text-books, that the City customs are of such force that they shall prevail against a general Act of Parliament either using negative or affirmative words.¹ Lord Coke, in numerous passages, lays it down, "that the special customs of the City shall prevail against the general law of the land;" and in the recent case of the *Queen against the Mayor of London*, reported in the thirteenth volume of the Queen's Bench Reports, the Judges at Westminster Hall seem certainly to have entertained doubts whether a conflicting City custom would be repealed by a general Act of Parliament in which the City was not expressly named; and the effect of such a doctrine must necessarily be at least to create doubts as to the operation of any general Act of Parliament within the City of London where evidence from the City records could make out an ancient custom inconsistent with it.

To give some illustrations of the mode in which the ancient and peculiar privileges of the City of London affect the ordinary administration of justice, we will refer to what are called the *City Courts*. A custom of London, which was, in former times, deemed so essential to the well-being of the citizens that it is recorded in upwards of twenty-two of the City charters, provides, that the citizens shall elect Justices of their own, and shall not plead without the walls for any plea. To uphold this privilege we find, within the City walls, an almost endless variety of local courts for the dispensation of civil and criminal justice; and of the very existence of the majority of these, the citizens of London, whose commercial dealings no corporate limits can bound, are profoundly ignorant.

For the information of our readers, and more especially of those who may be citizens of London, we will here give a short summary of these several Courts. The first in order is the Court of Hustings, whose jurisdiction, it is said, legally extends to all real and mixed actions, being also a Court of Appeal. Then there is the Court of Mayor and Aldermen

¹ See Vin Abr. Statutes, E. 6. § 10. See also cases collected in Pulling's Laws and Customs of London, 13. (note n.), 2nd edition.

of the Outer Chamber, or Lord Mayor's Court, having an unlimited jurisdiction in personal actions, and a peculiar jurisdiction in cases arising out of the customs of London; the Court of Mayor and Aldermen of the Inner Chamber, which has a legal jurisdiction over the City Companies, and as to brokers, watermen, &c., and other matters with which the Aldermen of London are, by the constitution of the Corporation, peculiarly entrusted; a Court belonging to the Compter of each of the two sheriffs, at present practically merged into one Court, having a jurisdiction almost concurrent with the Lord Mayor's Court; a Small Debts' Court, emanating, by Act of Parliament, from these two Courts of the Sheriffs; a Court of Orphans, and a general Court of Equity, both emanating from the Court of Mayor and Aldermen; a peculiar Court of Arbitration, held before the Lord Mayor; a Court for questions of apprenticeship, held before the Chamberlain; an occasional Court of Appeal, held by Commission under the Great Seal, called the Court of Commissioners, at St. Martin's-le-Grand; a Court of Policies of Assurance, established by a statute of Queen Elizabeth, still in force, and treated of by many learned writers as a City tribunal, but at this day not even known by name to the Underwriters at Lloyd's; a Court of Conservancy, held before the Lord Mayor as Conservator of the Thames; a Court of Quarter Sessions, held by the Lord Mayor, Aldermen, and Recorder, as Justices of the Peace; a Court of Gaol Delivery, held at present at the Old Bailey, under the provision of the Central Criminal Court Act; two Police Courts, held at the Guildhall and the Mansion House by the Lord Mayor and individual Aldermen in person, in their character of Justices of the Peace; a Court of Pie Poudre; a Court of the Clerk of the Market; the Coroner's Court for the City and Liberties; a Court belonging to the Lord Mayor as Escheator; and a Court leet, or wardmote, for each of the twenty-five City wards.¹

¹ There are nominally twenty-six wards, but one of these, Bridge Ward Without, is only such by name, having a district created by old acts of Common Council, under Charters from the Crown, which profess to make Southwark a part of the City. This ward, in the time of Edward VI., appears to have had

Fully to describe these various Courts would, as Lord Coke observes, "require a whole volume of itself:" we shall content ourselves with some passing observations upon their legal jurisdiction and actual practice.

The principle recognised by the early charters we have already alluded to,—that the citizens should elect their own Judges,—has been carefully observed as a city privilege ever since. The Lord Mayor and Aldermen are legally the Judges of the Hustings, Mayor's Court, &c., in civil cases, and of the Central Criminal Court, the Quarter Sessions, &c., in criminal matters. They are, also, the only acting magistrates of the City. It is true, the law officers of the Corporation take a great deal of the actual labour from the Aldermen's shoulders; but this is merely as officers,—the Mayor and Aldermen are the Principals.

The City of London tribunals have for the most part, in addition to the ordinary jurisdiction of Civil Courts of Record, a peculiar jurisdiction arising out of the ancient customs of London. One instance of this customary jurisdiction is familiar enough to our readers—that of foreign attachment—a process which the mercantile community, with some justice, urge should either be sanctioned by the general law of the land or abolished altogether. Another custom of London, with which our professional readers are probably also acquainted, is the *custom of distribution*. With the exception, however, of these two instances, we question whether the actual operation of the customs of London is at all known to any other than the officers and professional advisers of the Corporation, and those with whom they are involved in litigation. Many, however, are these customs of London, controlling the operation of the general law as to *femes covert*, *apprentices*, *orphans*, *wills*, *tenancies*, &c., and the conduct of trade in general and particular branches of it.

We all know what force and weight are attached, both in legal transactions and in the ordinary business of life, to the customs of agriculture and the usages of trade; we all

an alderman, common council, &c., duly elected by the inhabitants; but the Corporation now claim the right to name an alderman for this important district, and the senior alderman usually takes it as a snug place of retirement.

know their utility and their effect. The principal effect, however, of the customs of London is to give rise to a vast deal of litigation; and if the value of these ancient laws is to be estimated by their costliness, it may indeed be said of them as of the provisions of the Statute of Frauds, that each of them is worth a subsidy. The customs of London never become obsolete, however long they may have sunk into desuetude. They are declared by Act of Parliament to remain in force *licet usi non fuerunt vel abusi*¹; and the old records and books at Guildhall, that extend back to a very remote age, contain evidence of customs so little known even to the officers of the Corporation, that in order to certify into the Courts at Westminster the existence of any particular custom of London, it often takes the learned Recorder weeks to ascertain it.²

¹ Charter in Parliament of Rich. II. Rot. Parl. num. 37., cited by Lord Coke, as a statute not in print, 4 Inst. 253.

² See, as to this peculiar subject, Pulling's Laws and Customs of London, p. 10., 2nd edition

The learned Recorder thus explained to the Commissioners the course taken at the present day, in order to ascertain what the custom of London in any particular case really is:—"A *certiorari* is issued from the Court in which the case is pending, and in which the question has been raised as to the existence of a custom of the City, calling upon the Lord Mayor and aldermen to certify to that Court whether such a custom exists in the City, and what is its nature. The matter is then brought before the Court of Aldermen as the executive body of the Corporation, who refer it, by resolution, to the Recorder, in order that he may consult the other officers, if necessary, and search the precedents, and then report thereupon. If no doubt exists on the subject, I report to the Court of Aldermen what I believe to be the custom. If there be any doubt entertained by me with regard to it, it is the practice for me to name a day which meets the convenience of the litigant parties, who, having been allowed full access to all the documents in the custody of the Corporation, attend by counsel before me and state what are the precedents on which they rely, and what is the construction they place upon those precedents. There was a very difficult case in the Rolls Court respecting the distribution of a freeman's property, which in the City follows a different rule from the statutory distribution, and arguments by counsel were conducted before me during part of two days, involving a difficult question of mixed law and fact; the difficulty being to put a proper interpretation on a former construction of a custom. In that case I certified by word of mouth in the Rolls Court, and in the other case I certified in the Court of Queen's Bench. The mode is analogous to what I have seen adopted by the Speaker of the House of Commons when he reports to the House, by word of mouth, her Majesty's speech, and says that for convenience he has obtained a

In the City Courts, where every local custom of London which is raked up out of the dust must be judicially noticed, great confusion must continually arise; for as neither the contents of *liber albus liber* Dunthorn or the other authentic depositories of the laws of Guildhall are known to the suitors, the practitioners, or even the City Judges, it is sometimes difficult to speculate as to the result of the proceedings.

The Court of Hustings, whose existence is carefully provided for by the early charters of the City, has, as we have already observed, an ancient jurisdiction in *real actions*. Now, it was the peculiar object of the statute 3 & 4 Wm. IV. c. 27. to put an end, altogether, to these antiquated and cumbersome proceedings; but the statute is silent as to the customs of the City of London, and *real actions in the Court of Hustings were the creatures of the custom of London*.¹ Is it to remain in doubt whether the musty machinery of the Court of Hustings may not still be put in motion by some speculative suitor prosecuting claims which the Legislature has generally declared to be extinct? The 3 & 4 Wm. IV. c. 74. generally abolished fines and recoveries, but an ancient custom of the City of London provides that *a recovery by writ of right in the Hustings, suffered by the husband and wife, of the wife's lands, shall effectually bar the right of the wife and those claiming under her*.² Can this ancient customary mode of proceeding, which is not expressly dealt with by the Fines and Recoveries Act, be deemed inoperative in the City of London?

Again, the general law of testamentary disposition and the distribution of intestates' estates, has been settled by a series of statutes from the reign of Henry VIII. to the present reign; and the Legislature has recently provided a uniform system of regulations for the execution, attestation, and authentication of wills and testaments. In the City of London there prevail peculiar customs as to all these matters.

copy of it. In the same way I certify the customs of the City, and state that, for convenience sake, I hold in my hand a parchment, with the certificate in writing.

¹ See a list of the customary forms of proceeding in London in Pulling's *Laws and Customs of London*, p. 172.

² See Roll. Abr. 556.; Dyer's Eliz. 290. pl. 61.

Up to the time of George I. (when an express Act of Parliament removed the restriction), the custom restrained a citizen from devising his property away from his family; and even now, the property of a citizen dying intestate, is distributed differently from that of any other person; and the custom has been held to extend to a mere honorary freeman residing out of the city, and wholly unconnected with it.¹ With regard to the execution and attestation of wills, the City books prove the custom of London to be that lands, as well as *chattels*, *effectually pass by a will duly enrolled in the Hustings*, after being brought into Court, and proclaimed by the serjeant-at-mace, and proved by three witnesses sworn and examined as to the circumstances of the execution of the capacity of the testator; and the custom does not seem to require any *written* attestation, if the verbal evidence be satisfactory.² Can it be assumed, yea or nay, whether this custom is to be allowed to destroy, within the limits of the City, the salutary operation of Lord St. Leonards' Act, which requires a particular mode of execution and a written attestation? We must remind our professional readers also, that there is a custom of London as to orphans. In the language of this ancient custom, "if any freeman or free-woman die leaving orphans under age unmarried, the custody of their bodies and goods belongs to the City; and their executors and administrators must give true inventories of all their goods and chattels, and must bind themselves to the Chamberlain to the use of the orphans, to account for the same upon oath, which, if they refuse to do, they may be committed."³ Is it at this day to remain open to contention whether the heiress of any statesman or hero who dies after obtaining the honours of the freedom of the City, *de facto*,

¹ See the case of *Onslow v. Onslow*, 1 Simons, p. 18., where it was held that the estate of Sir Francis Drake, who was made an honorary freeman of London, on the occasion of Lord Rodney's victory, was subject to the custom of London, and must be distributed so as to give his widow, who had married the plaintiff, a larger share than she would have been entitled to by the general law of the land.

² See as to this Co. Litt. 111.; Bratton, lib. iv. fol. 272.; and *Reeves v. Winnington*, 2 Stowe, 249.

³ Bac. Abr. Customs of London, B.

becomes a City orphan and a ward of the Court of Aldermen?¹

Ever since the Statute of Frauds, the conveyance of estates and interests in land, except by an instrument in writing, has been deemed to be prohibited by law. But here, again, the custom of London conflicts; and the old Guildhall law provides that *a bargain and sale for valuable consideration of houses or lands in London by word only is sufficient to pass the same.*² Upon this important conveyancing question is the antiquated law of the City records, or the provision of the supreme Legislature to prevail?

There are numerous other equally startling instances of a conflict between the law laid down in the muniments of the City and the provisions of our statute-book. Few legal questions excited such general attention at the commencement of Her present Majesty's reign as the abolition of arrest on mesne process; but even this is found to conflict with a venerable custom of the City of London which allows the creditor to arrest his debtor about to abscond, even before the day of payment has arrived; and it has been doubted whether this custom is dealt with at all by the imprisonment for Debt Act³; so doubts have been started whether the Prescription Act of 1833 destroys the custom of ancient lights in London⁴; and there is hardly any clause in the Statute of Frauds which has not to contend with a custom of

¹ Up to the time of the Revolution of 1688, the Court of Aldermen were in the habit of freely exercising their jurisdiction over City orphans. Having, however, in taking care of the orphans' estates, got into a rather awkward scrape by investing the produce on insufficient security, Parliament interfered, under the circumstances already mentioned, in order at once to relieve the City Chamber from present loss for the past and from incurring similar risks for the future. The 5 & 6 W. & M. c. 10., which gave the City the fourpence a ton on coal for the relief of the poor orphans and other creditors of the City, provided that no future order should be made for payment of the money of orphans into the City Chamber; but there is no prohibition against the exercise of the jurisdiction of the Court of Orphans in other respects. An application was, indeed, made some years ago with the view of putting this jurisdiction in force.

² See on this point, 2 Jurist, 675.; *Busher v. Thompson*, 16 Law J. C. P, 59.

³ See *R. v. Mayor of London*, 13 Q. B.

⁴ See observations of Lord Denman, C. J., in the demurrer of *Salters Co. v. Jay*, id. ib.

the City of London, to the contrary, and which custom, not being expressly dealt with, it may be perhaps judicially determined, is still in force.

All this is, to say the least of it, *very inconvenient*; but the conflict of laws in the City of London is not confined to civil remedies. The pending inquiry has led to researches which make it just possible that the amelioration of our code of criminal procedure may be legally held to be of no avail within the privileged limits of the City; for here again there are ancient customs of London, confirmed by Act of Parliament, and, seemingly, not yet repealed, which provide forms of proceeding with respect to criminals entirely opposed to the general law of the land.

In the good old time, when the guilt or innocence of parties accused of crime was proved, not by a tedious investigation before a Judge and Jury, according to certain monotonous rules of evidence, but by the lively process of the *ordeal* by fire and water, or the chivalrous trial by battle, the prudent citizens of London, averse both to the excitement of the one and the danger of the other, claimed for themselves a safer mode of trial, and one which perhaps did in former times save the privileged life of many a criminal whose name was enrolled in the civic books. *The trial by purgation*, which, in criminal cases, has been generally treated in our law books as a special privilege of the clergy, only taken away from them by the 8th Eliz. c. 4., seems, from the City records, to have been once in full force as a privilege of the citizens of London, based on a custom of the same validity as those we have already alluded to:—

“According to the ancient customs and liberties of the City,” it is laid down “there were three purgations in the pleas of the Crown, whereby such as were called in might acquit themselves: first, was *de morte*, of death or murder; the second, *de maihemia*, of maiming; the third purgation was *de insultis, baculis, tostis, vulnerationibus*, &c., of assaults, battery with staves, burnings, woundings, and such like injuries, done in the time of the Lord’s Nativity, or in the Easter and Whitsun weeks. By the great law

¹ See the instances cited in *R. v. Mayor of London*, *supra*.

the appealed and accused made six oaths in his own person that he was innocent of felony and breaking the King's peace, and of the whole crime laid upon him, and so let God help him and those holy things: after that six men were to swear that the other swore a sound and safe oath, according to their consciences and understandings, and God help them, &c.; and this order was to be continued to the number of thirty-six men complete; so that, first, the accused swore, and then, after him, the six, until the number above noted were full. He that was accused of maiming took three oaths in his own person that he was free and innocent of felony or breaking the King's peace, and then six men swore that he made a just and true oath according to their consciences and understandings; and this order was continued to the number of eighteen. He that was accused of assault, battery, burning, wounding, blows, bloodshedding, and other injuries done at the holy times before mentioned, made an oath in his own person as before; after him six men swore as before, who were chosen out of the neighbourhood where he dwelt."

It is this custom and privilege of the City which is alluded to in some of the early London charters, viz., the charters of Henry the First, Henry the Second, and Henry the Third. The former of these charters provides, that "if any of the citizens shall be impleaded concerning the pleas of the Crown, the man of London shall *discharge himself by his oath*, which shall be adjudged within the City."

It would appear that the privilege thus recognised by Henry the First's charter was not very scrupulously attended to by the King's Justices, for Hoveden records an instance in the beginning of the reign of Henry the Second, where a citizen of London, who had failed in the water ordeal, *was hanged*. Soon after this event we find the charter of Henry the Second providing that "the citizens of London should discharge themselves of the pleas of the Crown according to the old usage of the City of London;" and this privilege is again ratified in charters of Richard the First, John, and Henry the Third; a charter of the fifty-second year of this latter monarch providing, "that none of the said citizens shall wage battle; and that, for the pleas belonging to the Crown, chiefly those which may chance within the said City and suburbs thereof, they may discharge themselves according to

the ancient custom of the said City. This, notwithstanding, except that upon the graves of the dead, for that which they should have said if they had lived, it shall not be lawful precisely to swear. But instead and place of those deceased who had been selected before their deaths to discharge those arraigned concerning the things belonging to the Crown, there may other free and lawful men be chosen, which may do and accomplish that without delay which by the deceased should have been done if he had lived."

Whilst such peculiar privileges appear by the Guildhall records to belong to a citizen for his personal immunity, these documents make out the power of the City magnates over the unprivileged portion of the Queen's subjects suspected of crime, as something more than that possessed by the Queen herself or any of her Judges at the present day.

Many of the early charters of the City of London recognise in the Corporation the old rights of *ingfangtheft* and *outfangtheft*. These arbitrary powers, which in feudal times were freely conceded to Lords of Manors, &c., with the professed design at once to exterminate crime, and appropriate the property of the accused for the benefit of the owner of the franchise, are confirmed to the Corporation of London by a charter in Parliament of Edward the Third¹; or, more correctly speaking, a special act of the Legislature.²

The franchise of *ingfang* theft gave to the possessor a right *to take thieves or robbers on fresh pursuit*, or with the goods found on him, and try them summarily without any indictment³; and by a grant of *outfang* theft, the owner of the franchise might claim the criminal after he had escaped from the franchise; and in both instances appropriate to himself the goods and chattels of the convicted.

It was found, even in the reign of Edward III., that these summary powers were capable of abuse; and, by two statutes of that reign, they were generally taken away. The City of London, however, is not mentioned in either of them and

¹ Charter in Parliament, 1 Edw. III.

² Rot. Parl. See as to this, opinions of Judges in *re Islington Market Bill*.

³ Cl. & F. 518.

⁴ Vide Hawkins, P. C.

Parliament; as it will be observed, subsequent to those statutes, expressly confirmed this franchise of the citizens.

We are not going gravely to contend that the actual exercise of this monstrous power will, at this day, be attempted by the civic magistrates: we refer to it only as a sample of the materials of which the much-talked-of ancient *liberties and franchises* of the City of London legally consist.

We are perfectly aware that the only consequence of any of these ghosts of City privileges being used to frighten Her Majesty's subjects, would be, that they would be solemnly laid in the grave by Act of Parliament; but if they no longer serve for any useful purpose, why should they be suffered to exist at all? Why should doubts continue whether the operation of the general law of the land is to be bounded by Temple Bar. We all know that many, if not all, the customs and privileges of the City were originally based on good grounds. We know that when justice, both in civil and criminal cases, was corruptly and ineffectually administered under the general law of the land, the comparative superiority of the civic institutions made it a valuable privilege to any one to have justice administered according to the law and custom of the City of London.

Those old customs of the City of London, for the security of which alone it must always be remembered, the City tribunals were established, have long since ceased to be regarded as either valuable or useful. As *customs*, in the strict sense of the term, they have died a natural death; for they are never voluntarily adopted or used: they exist only as ancient laws, kept alive by special Acts of the Legislature, which an Act of the Legislature of this day may, and most probably will, at once put an end to.

It has been the aim of Parliament in modern times, to simplify and reduce every branch of our Law into something like a systematic form. Here in the place of resort of the merchants of the whole world, in the heart of the metropolis of enlightened England, exist barbarous laws, crude regulations, and antiquitated forms which hamper trade and commerce, encourage useless litigation, derogate from common right, and impede the course of the general law of the land.

The maintenance of these precious *customs of London*,—the continuance of these antiquated tribunals,—this ancient privilege and right of the ruling powers at Guildhall, to have law in the City administered by justices and magistrates of their own appointment.—Are these, in the year 1854, to stand in the way of reform, of an efficient system of municipal law, and a uniform mode of dispensing civil, criminal, and police justice for the metropolis of England?

Let us hear what the City defence says upon the subject. It is almost silent about the free customs confirmed by Magna Charta, about the hustings, the Mayor's Court, and the Commissions of oyer and terminer; but it speaks with some warmth of the sole practical relic of aldermanic tribunals, the City Police Courts.

“ We believe that there exists amongst the citizens of London a very strong prepossession in favour of the retention of aldermen as magistrates, instead of having justice administered in the City by stipendiaries; and in our opinion there exists well-founded reasons for this prepossession. Almost all the aldermen are or have been engaged in the pursuit of commerce and trade within the City, and have been accustomed to judicial inquiries, *by occupying the post successively of petty, special, and grand jurymen for many years*. In the great majority of cases that come before the aldermen the matters to be investigated are questions of fact, on which their commerce with the world, and their knowledge acquired as jurymen, prove of the greatest value; and the relative proportion of acquittals and convictions of their commitments to the Central Criminal Court manifestly prove that the judgment exercised by them is at least as frequently justified by the result of the trial as in cases of other commitments to the same tribunal. No witness has questioned the character and professional ability of *the clerks* in attendance upon the Lord Mayor and the aldermen in the justice-rooms. *To them is committed the exclusive duty of adjusting the forms of the proceedings to meet the cases brought before the aldermen, and they are men of legal education and attainment, which qualify them to assist the aldermen with their judgment and advice in cases where questions of a purely technical character arise, upon which it may be supposed that aldermen, like all other magistrates not of the legal profession, are not so familiar.*”

The Committee of Aldermen and Common Councilmen

who drew up this document go on, after the manner of Guildhall, to show what a number of important offices and honours the Aldermen Justices enjoy : —

“ Out of the twenty-six, eight of them are, or have been, members of the House of Commons, five of them for large metropolitan constituencies. Fifteen of the aldermen, as well as several members of the Common Council, are county magistrates, some of them for two or three counties. One of the aldermen is, and has been for many years, a Bank director, and is the chairman of the Society of Merchants Trading to the Continent ; one of them is the chairman of the Committee of the Joint Stock Banks of London ; two of them are directors of the London and Westminster Bank ; two of them are directors of the London Joint Stock Bank ; and two of them of the Union Bank ; and most of them who have leisure and inclination, like many of the Common Council, are directors of insurance companies, gas companies, canal and water companies connected with the Metropolis.”

According to this defence, then, whilst it is deemed advisable in the Queen's Courts at Westminster as well as in the Police Courts of the Metropolis, to have justice administered according to the law of England by duly qualified *stipendiaries*, giving up their whole time to their official duties, it is better that, east of Temple Bar, justice shall be administered by Aldermen *not familiar with questions of a technical character*, but who, graduating for the judicial office through the various stages of petty, special, and grand jurymen, and filling the functions of actual members of both branches of the City Parliament, nominal Commissioners of oyer and terminer at the Old Bailey, and Judges of the ancient City Courts, have thrown upon their worshipful shoulders not only the cares and responsibilities of their private affairs as traders, but also of directorships of no end of joint-stock companies.

We must not leave the subject of this system of City customs, franchises, and exempt jurisdictions of London, without referring to the number of local and personal statutes which the Corporation are obliged to obtain in order to keep it together. As already observed, saving clauses are continually introduced into general Acts of Parliament for ef-

fecting useful reforms, in favour of the City privileges; such clauses, we see, are now introduced into the County Courts Act, the Lodging Houses Act, the Public Health Act, the Metropolitan Police Act. As the authorities at Guildhall, however, only procure this exemption under a solemn promise to the Government to effect similar reforms within the City in another shape, Parliament has to legislate specially on a private bill brought in for the special case of the City of London, and so special police acts exist for the district east of Temple Bar; and the regulations of lodging-houses, and the public health for that district, are to be sought for in the City Sewers Acts, and what is now called County Court Law is to be gathered with regard to the City, from a private act for regulating the practice of the Sheriffs' Court.¹

¹ The City Small Debts Act is one of the most recent samples of *City-Remembrancer legislation*. The first general Small Debts Act passed in August, 1846, the object recited in the preamble being that "one rule and manner of proceeding for the recovery of small debts and demands should prevail throughout England." In compliance, however, with the City privileges, it was provided, "that no Court should be established under that Act in the City of London." There were already, within the limits of the City, the numerous ancient Courts which we have already enumerated, but neither by virtue of their own peculiar powers of internal legislation, nor by an appeal to Parliament, had anything been done to effect the object aimed at by the Legislature under the new system, and to reform these ancient Courts so as to comply with the urgent demand of the public for speedy and simple forms of procedure in them.

The Corporation, under a stipulation with the Government, undertook the onus of bringing before Parliament a special Bill of their own for this purpose. Accordingly, in the Session after the County Courts Act passed, the local Act 10 & 11 Vict. c. lxxvi., established a Small Debts Court for the City of London; but the ancient City Courts, with all their abuses, remained untouched. In 1852 the jurisdiction under the General County Courts Act was extended to 50*l.*; and the City Remembrancer, who had found it necessary to have his local Act amended, and had, in that Session, a second amending Bill before Parliament, availed himself of some of the clauses of the general Bill then under discussion, to give jurisdiction to the City Local Court also to the extent of 50*l.*; but the City Remembrancer's Bill, as at first drawn, had the clauses as to costs taken from the 9 & 10 Vict. c. 95. The worthy Remembrancer seems to have, first of all, struck out the words "twenty pounds" and inserted "fifty pounds;" and then also added the clauses in the County Courts Amendment Act of that Session, which is worded differently, but still gives the plaintiff his costs who recovers more than 20*l.* in the Superior Courts. The effect of this confusion between the City Local Act and the General County Courts Act is, that if a defendant, against whom a verdict is obtained in the Superior Courts

Such being the nature and such the operation at the present day of a large portion of the *ancient liberties and free customs* of the City of London, let us now look at the nature and operation of those more substantial privileges which the Corporation derive under the title of charters or prescriptions for revenue purposes. The Corporation gain, according to their own statement, about 100,000*l.* per annum from rents and quit-rents of property of which they have the uncontrolled disposition; they also derive an equal amount of revenue under the name of tolls, dues, and impositions, made on the citizens and their merchandise. Besides this large revenue of 200,000*l.* per annum, the Corporation receive, under legal authority, for paving, lighting, sewers, and police rates, a sum which, according to their own statement, is about 111,000*l.* per annum more.

To save any dispute as to figures, and to avoid the charges of inaccuracy, &c., which the gentlemen of Guildhall are in the habit of making (in not very mild or forbearing language), we will assume the Guildhall return to be correct, and all evidence to the contrary to be false.¹ That this is the whole revenue derived by the Corporation for municipal purposes, and that the 9*d.* a ton on coal is a duty with which the City have nothing to do; that the *Bridge House Estate* and the *Irish Estate* need no comment. We have, at all events, a right to consider the sources from which it is derived, the

for between 20*l.* and 50*l.*, can show that he is, by reason of temporary residence or employment, within the provisions of the City Courts Act, whether the plaintiff were aware of the fact or not, the plaintiff will be deprived of costs, though the General Small Debts Act expressly entitles him to them.*

¹ The Blue Book of the Corporation shows a gross income from rents, quit-rents, renewing fines, markets, tolls, and duties, offices, bequests, brokers' rents, freedoms, interests, sheriffs' fines, and casual revenues, of 213,572*l.* In the evidence of Mr. Bennock, one of the most intelligent members of the Corporation, we find that there is a corporate income beyond this of 8377*l.* from the navigation, and 47,021*l.* from the Bridge House Estate. The whole income of the Corporation, including these items, the sewers and police rate, and the receipts from the Irish Society, Mr. Bennock states, in round numbers, to be nearly 400,000*l.* a year. Other witnesses state it to be much larger.

* See *Castrique v. Page*, 22 Law Journal C. P. 145., and observations in 17 Jurist, p. 66.

manner in which it is administered, and the advantages that actually accrue to the citizens of London from it.

Of the 100,000*l.* per annum derived by the City from rents and quit-rents, it has been urged that some portion, at all events, has been derived from property to which the Corporation has no absolute title, the land from which it is derived being obtained by encroachments and occupation, or held merely for the purposes of some specific trust, which is disregarded. The Guildhall *defence* thus answers this charge:—

“ 1. A large portion of this property is built upon the site of the old walls, gates, and fortifications of the City, which existed when London was a flourishing free city under the Romans; and on their departure from the island the property devolved upon the citizens, and has been possessed by them during the twelve centuries that have elapsed since that event; for although one of the witnesses has deposed that this site was part of the common soil of the City, and although King Henry VI. did by charter profess to grant to the citizens of London the common soils within the City, such charter could only be considered as an acknowledgment of the *pre-existing rights* of the citizens, which had been secured to them, with their other rights, *by the charter of William the Conqueror*, which had been recognised by similar instruments in subsequent reigns, and which, though abrogated by King Charles II., were restored and confirmed by Act of Parliament as soon as the Revolution of 1688 had restored law and order within this realm.

“ Having regard to the principles by which property is acquired and protected in this country, we apprehend that the possession of 1200 years would confer an adequate title, even if we could produce neither Charters nor Acts of Parliament to vouch our rights. The title of the Corporation to the Conduit Mead Estate, though of much later origin, is secured by the possession of centuries, and the property which has for ages been held by the Corporation from the prebend of Finsbury is vested in them by Act of Parliament until the year 1867.

“ A great portion of the rental of the Corporation is said by some of the witnesses to be derived from embankments of the Thames, and the pending suit with the Crown is referred to as if that suit had been intended to put an end to such encroachments.

“ This statement is founded on a *total misapprehension of the facts*. The entire amount of rental derived from embankments

made, not for the sake of revenue, but for the improvement of the river and the convenience of commerce, does not exceed 1100*l.* per annum. It is not mixed with the Corporation rental, and forms no part of it. It is, *and has been for many years*, kept as a separate fund, and is applied to the purposes of conservancy and improving the river only. This sum of 1100*l.* formed only a portion of the amount expended by the Corporation under this head, the remainder being paid out of the corporate funds."

It is out of the question, of course, to discuss in detail the validity or invalidity of a title thus curtly described. The authorities at Guildhall adopt the suggestion of old-fashioned lawyers, and refuse to show their charters. Some observations are, however, suggested by their present *defence*. It is not here stated, nor will it, we believe, be alleged on the part of the Corporation, that this 100,000*l.* a year has been bought in the market or otherwise acquired as private property is in this country. From the time when the Corporation first acquired the right to hold lands in mortmain¹, we have no proof that the City funds have ever been laid out in *rents and quit-rents*; but we do know that certain trusts have been reposed in the Corporation — that they had the custody of the gates and walls² — that they held the common grounds for common purposes — that they have had the conservancy of the Thames — that anciently they had the onus and the profit of supplying London with water from public conduits, purchased at the public cost³ — that as late as the reign of Charles the First they had the grant of Smithfield and Moorfields, to be *reserved for public and common uses* — and that, for the support of these public trusts, they have been in the

¹ This right Mr. Norton traces back only to the reign of Edward IV., and he cites various authorities to show that previous to this time the authorities at Guildhall only exercised a sort of stewardship over the city walls and the common waste lands of the City for public purposes. So much for the title.

² See an account of the various encroachments on the City walls, Stow, lib. i. c. i. p. 13.

³ An enumeration of the trust property held by the Corporation for support of the ancient City conduits, is given by Stow, lib. i. c. 6., where he shows how these conduits have been gradually choked up and built upon. The springs at Paddington are let on lease, and produce a revenue carried to the Orphans' Fund Account under the statute already mentioned. The Conduit Mead Estate, above referred to, is now known as New Bond Street. Moorfields is an entirely distinct property from what is called the Finsbury Estate of the Corporation. This is a leasehold property claimed under a private act, 9 Geo. III. c. lxi.

habit of levying the tolls and dues which form a part of the most objectionable branch of their large revenue. If we look at the statutes for building the City of London after the Great Fire, we certainly see some proofs that whole tracts of land within the City, now covered with buildings, could only have been so diverted from their original purposes by the sanction and to the profit, or by the negligence and to the discredit, of the Corporation of London.

Smithfield — venerable *Smithfield*! — that the Corporation so stoutly defended as their ancient property, when the inhabitants of London demanded the removal of the cattle-market abominations, was, with *Moorfields*, granted by the charter of Charles the First to be reserved for public and open uses; and the 22d Car. II. c. 11. s. 82. provided with regard to these void places within the City as follows: —

“ And whereas, several sheds, shops, and other buildings have been erected (since the late dreadful fire) in *Smithfield*, *Moorfields*, and other void places within the said City and liberties by license of the Lord Mayor, Aldermen, and Common Council of the said City, for the accommodation of such inhabitants whose houses were then burnt or demolished, for the better carrying on of their respective trades, which, if they should be suffered to have longer continuance than the present exigency of the occupiers thereof doth require, would be an occasion to divert the trade of the City, and to discourage such as have rebuilt houses within the said City: Be it therefore enacted by the authority aforesaid, that the Lord Mayor and Court of Aldermen for the time being shall be and are hereby empowered and required to cause all and every the said sheds, shops, and other buildings aforesaid to be taken down and removed at or before the 29th day of September, A.D. 1674.

The Corporation obtained, it seems, by the exertions of their *Remembrancer*, a private act in 1812¹, to build on *Moorfields*; but the open space of *Smithfield* has, without such sanction, been so choked in by buildings, that the Corporation have been compelled, out of the City funds, to lay out large sums in endeavouring to widen and extend it; and ultimately, when its confined area rendered it so insufficient for a cattle-market that the poor beasts could only b

¹ 52 Geo. III. c. cex.

posed to view by of means *ring droves*, they have been compelled to abandon it to the cause of public improvement.

An earlier statute, passed immediately after the Great Fire¹, provided, "that for the preventing inundations and for easiness of ascent, the street called Thames Street, and all the ground *between the said street and the river of Thames, shall be raised and made higher by three feet at the least above the surface of the ground as now it lieth*;" and certain temporary provisions were made to prevent buildings being erected within a certain distance of this embankment¹; and the statute before alluded to, which passed three years afterwards², expressly provided, that for

"The better benefit and accommodation of trade, and for other great conveniences, there shall be left a continued tract of ground all along from London Bridge to the Temple, of the breadth of forty feet of assize, from the north side of the river of Thames, to be converted to a key or public and open wharf: and that, in order thereunto, all buildings, sheds, pales, walls, inclosures, and other obstructions and impediments whatsoever now standing or being within forty foot northward of the said river of Thames, between the places aforesaid (cranes, stairs, and docks only excepted), shall within eight months now next ensuing be taken down and removed, and the said ground cleared and levelled, and that from henceforth there shall be no building or erection whatsoever (except only cranes, stairs, and docks as aforesaid) placed or set within or upon the said forty foot of ground, or any part thereof, between the places aforesaid: and that all buildings that shall hereafter immediately border upon any part of the said ground, upon the north side thereof, shall front and be placed in the line that shall be set out for the bounds of the breadth of the said forty foot of ground northward."

There are provisions in this statute for defining the boundaries of each proprietor's interest in the space left open, and this circumstance has been relied on by certain apologists of the Corporation of London, to prove that the whole open space which was thus directed to be left open, and which the old maps of London clearly show was for many years kept open in compliance with the Act of Parliament, was altogether private property; but these apologists seem to forget or to sup-

¹ 19 Car. II. c. 31. s. 34.

² Ibid. s. 35.

³ 22 Car. II. c. 11. s. 44.

The City of London Corporation Inquiry. There could not be any question as to the fact we have ample evidence that the directions for leaving an open space from the London Bridge has been entirely disregarded; that the whole space, embankment and all, has, with the exception of an occasional flight of watermen's stairs, &c., been built upon, either with the sanction and for the benefit, or by the negligence and to the discredit, of the Corporation. To parade a separate account kept since the year 1827, of recent embankments from the Thames, seems indeed calculated to produce a total misrepresentation of the facts.¹

We have no such roll of the City lands. We cannot enumerate the localities from which they are derived, but if we find proofs so strong, of a perversion by the Corporation of London, of one species of trust property, we do not see anything very monstrous in the case of other portions of the rents and quit-rents which they enjoy. An income derived from houses built on the site of the City walls, for the support of which tolls are still levied, and by the conversion of the public conduits and open grounds to profitable building purposes, and devoted to the ordinary expenses of the Corporation much like an income derived by means of a breach of trust. The remaining portion of the revenues of the Corporation of London is derived from indirect taxation, under the name of tolls, dues, offices, &c., which the Corporation *defence* states to be "*alike unobjectionable, and to be held by prescription or recognised legal title of the highest order.*" We may sum them up shortly as tolls for passing the City gates and walls (the site of which, it must be remembered, has been turned to profitable building ground),—dues at the City markets (exceeding by a considerable sum any expenses sustained by the City in reference to them),—a tax upon corn, potatoes, fruit, oysters, &c., under the name of metage (levied by meters and porters, paid by a compulsory charge on the trader),—

¹ The item of rents in "the City Accounts" used to comprise the sums received by way of rents for embankments and encroachments on the Thames, but in 1827 these were carried to a separate account.—*Report of the Municipal Corporation Commissioners, London and Southwark, 1837*, p. 200.

taxes on coal (for the peculiar punishment of the consumer),—taxes on brokers (under the pretext of securing their honesty),—and taxes on apprentices and freemen, and fines on those who won't take office, in order to teach them by times the value of *City privileges*. The Corporation are also entitled, like other lords of franchises, to waifs and strays, and goods and chattels of felons, &c. ; but these are lumped together, in the *City accounts*, under the name of *casual*, and given to the sheriffs towards their state expenses.

Like the liberties and free customs we have already mentioned, these tolls and franchises have been productive of litigation. Derived from a "*legal title of the highest order*," they have been at different times called in question both by the subject and the Crown. Ancient tolls and dues have been generally founded on some good considerations afforded by the receivers to the parties charged. In the case of the City of London, however, where ample rates are levied for police, for sewers, for paving, for water, for gas, and for every other municipal purpose larger than those paid in other places, no such consideration, in the ordinary acceptation of that term, appears to be afforded. A mere grant from the Crown would not give a *legal title of the highest order* to the City, and our Law Reports contain a goodly collection of the *cases* upon this *legal title of the highest order*.

A memorable proceeding between the Crown and the Corporation in the time of James I., as to the *metage* of corn, &c., is recorded over and over again by Sir Edward Coke,—who, it must be remembered, was Recorder of London, and inclined to favour the City privileges. An information was filed by the Crown against the City, and a formal *confession* of the City title was made by Sir Edward Coke in his capacity of Attorney-General.¹ Messrs. Combe, Delafield,

¹ The following is an extract of these proceedings, taken from "*Coke's Entries*," vol. iv. fol. 535, 536. and put in evidence by the City Solicitor on the present proceedings :— " And, further, the same mayor and commonalty, &c., say, that all the customs, liberties, privileges, and franchises of the City aforesaid, for a long time used, by the authority of the Parliament of the Lord Richard the Second, late King of England, after the conquest, held at Westminster in the seventh year of his reign, were ratified and confirmed to the then mayor and commonalty of the citizens of the city aforesaid, and to their successors; and by that warrant the same mayor and commonalty and citizens of the said City of

and Co. have for many years had proceedings pending relating to this *legal title of the highest order* of the Corporation of London; and the discreditable delay, the profligate expense, which have been incurred in order to prevent that title being investigated, are now matters of notoriety.

The revenue thus derived by the Corporation of London, how is it applied? In what way do the Corporation fulfil their trust to their constituents? In what manner does the continuance of a Corporation at Guildhall conduce to an effective system of municipal government for the Metropolis? Is it productive of good or of evil even within the limited space to which its municipal boundaries have, in the course of time, been restricted?

The municipal boundaries of other towns have been extended so as to include the whole area with which the cor-

London for the whole of the said time, &c., to hold and exercise the said office, &c., have used and still use, &c.

"And Edward Coke, Knight, the Attorney-General, &c., who, &c., present here in Court, at the same day, in his own proper person, and being asked and required if he was willing further to proceed in the premises against the aforesaid mayor, &c., says, that having seen the plea of the aforesaid mayor, &c., and having fully and diligently understood and examined, &c., because it sufficiently appears to him, and is sufficiently attested here in Court, as well by view of the aforesaid act of confirmation of the liberties, privileges, and franchises aforesaid, as of divers evidences and other proofs, as by the relation and testimony of divers trustworthy persons, that the aforesaid mayor, &c., and all their predecessors from time whereof the memory of man runneth not to the contrary, have used and enjoyed all and singular the liberties, privileges, and franchises aforesaid, and other the premises in the said information above specified, in manner and form above in pleading alleged. The same attorney of the now Lord the King doth not deny the same, but confesses and acknowledges the plea aforesaid, by the same mayor, &c., in form aforesaid above pleaded, to be true; and that he, the same attorney, &c., will not further prosecute in the premises against the said mayor, &c.; whereupon the aforesaid mayor, &c., pray judgment in the premises; and that they and their successors may use, have, enjoy, and perceive all and singular the liberties, privileges, offices, franchises, wages, rewards, and fees aforesaid, and other the premises in their aforesaid plea mentioned; and, on view of the premises here had by the barons, and on mature deliberation between them, it is considered by the same barons that the aforesaid mayor, &c., and their successors, may have, perceive, enjoy, and use all and all manner of offices, privileges, liberties, franchises, wages, rewards, and fees aforesaid, and other the premises in their plea aforesaid above claimed, from time to time by virtue of the aforesaid Act of Parliament and other the premises." Shortly after this the City obtained a charter from James I., ratifying and confirming the title thus made out.

porate body is identified. The Guildhall body, though nominally the Corporation of London, are restricted both for good and for evil within the small space of 600 acres, and to a population of about one-tenth of the whole Metropolis of London. The great body of merchants and traders who, for a portion of the day, frequent that limited space, are as little connected with the ruling powers at Guildhall as the inhabitants of Paddington or Chelsea. To them Guildhall is, in fact, as restricted a species of Corporation as any of the ancient Guilds whose banquetting halls attract the eye of the stranger in so many of the narrow streets east of Temple Bar.

Guildhall, however, is still an ancient and venerable Corporation. If it has large revenues, it still has many to participate in them. It still has, if not its ancient power and influence, its time-honoured *dignity* to support. State festivals and state processions, much hospitality to keep up for the credit and enjoyment of its members and their favoured guests¹, and a large staff of officers for the purposes of state—for the vindication of their ancient liberties, privileges, and franchises, and for the efficient working of that heavy machinery which has gone on, with the aid of an occasional patching, for so many, many ages.

The Lord Mayor is still King of the City. For his year of office he leaves his warehouse and his trade, shuts up his private residence, and lives "right honourable" at the City Mansion House. He has his Sword of State and his Sword-bearer; his maces—the *same as royal*²—carried before him, and his serjeants to bear them; his marshal, and his marshal's men; his state coach and his powdered footmen; and an establishment to keep up which costs the City Chamber 25,000*l.* a year.³ There are two sheriffs, who are state officers also, at a minor cost. There are, besides the Lord Mayor *pro tem.*, twenty-five aldermen, who have been or

¹ Though not ourselves blessed with invitations to Guildhall or the Mansion House, we feel in honour bound to speak with veneration of Civic hospitality which the Bench and the Bar have so often partaken of. The present "Queen's Ancient Serjeant," who is a great authority on the privileges of his order, once said, that the serjeants have a sort of prescriptive right to *calipash and calipee*.

² This privilege is granted in so many words by the 4th Charter of Edw. III.

³ Many witnesses prove the item of this allowance.

will be Sheriffs and Lord Mayor in there are 204 members of the Common Council little expense to the Corporation, to deliberate

To aid and assist these *honorary* membership, there are appointed a staff of paid officers whose salaries amount to 38,672*l.* per annum: a staff of officers of law, and officers for every part of the civic principality — legislative, judicial, and executive. The Lord Mayor and aldermen are the dignified administration of those high judicial duties which devolve by charter on justices chosen by themselves.¹ They are constitutionally the judges of the civic tribunals which we have already mentioned. They are judges of oyer and terminer and gaol delivery, and sole justices of the peace within the liberties of the City. To avoid inconvenience to these civic dignitaries in the discharge of their arduous duties, a Recorder at 4,000*l.*, a Common Serjeant at 1500*l.*, practically relieve them of their responsibility off their hands. To aid and assist in their magisterial duties, as they are not stipendiaries themselves, stipendiary clerks, whose efficient services are valued at salaries of 1800*l.* a year vouch for, are appointed to assist in the City police courts. To aid and assist in the discharge of their duties, there is a Justice of the Peace Court appointed, with a salary of 1200*l.* a year, and a Clerk, whose profitable remuneration is grace fees for the issue of writs of execution against the goods of the insolvent and unfortunate debtors; and other officers who assist in the execution of the law. The Lord Mayor, of course, requires a staff of officers. The Sword-bearer receives 550*l.* a year, the Mace-bearer 550*l.*; and the Upper and Under Marshals 500*l.* each. Besides the City Bargemaster, &c. The Lord Mayor, as conservator of the Thames, and so he has a duty to perform, that duty done, at a salary of 500*l.* a year. The Lord Mayor of London, and performs that duty by a deputy, who receives a salary of 482*l.* The Corporation have the goods of the City in pawn, so a High Bailiff is appointed, with a salary of 400*l.* a year. So much for *honorary* services.

¹ See *antè*, p. 402.

To fight the battles of the Corporation in the Courts at Westminster, a permanent City Solicitor is appointed, at a salary of 1700*l.* a year. The City Remembrancer, as we have already seen, does the same good office for the Corporation in parliamentary proceedings, at a salary of 1765*l.* a year. There is a Comptroller permanently employed for the conveyancing work of the Corporation¹, at a salary of 1500*l.* and a Chamberlain (at present, and by the usage of many years, elected from the aldermen), with an expensive establishment, for the receipt and disbursement of the City funds, and a salary for himself of 2500*l.* a year²; and then last though not least among the City Law Officers of importance, is the Town Clerk, a learned Serjeant-at-Law, with a salary of 1800*l.* a year and an establishment provided for him for the purpose of preserving the ancient muniments of the Corporation, keeping a record of the proceedings of the City Parliament or Commons, and their numerous committees and sub-committees, and giving advice and assistance whenever called upon to do so, at the deliberations of those Corporation meetings.³ Notwithstanding, however, this great outlay amongst lawyers, the Corporation are charged about 4600*l.* a year for general legal expenses, and about 1400*l.* for Parliamentary expenses.

The present members of the Corporation of London, in their formal *defence* laid before the Commissioners, seem to have imbibed the notion that in order to divert a reform of the present system, and the substitution of one which should really serve the purpose of a Metropolitan municipality, it would suffice to urge that there is no ground for the imputation of "moral turpitude or personal corruption." A large portion of this *defence* is taken up with a comparison of the conduct and *respectability* of members of the Corporation in the present century, and the conduct and respectability of

¹ There is at this moment a vacancy in this office by death. It remains to be seen what course will be taken with regard to it.

² The whole amount of the establishment of the Chamberlain's Office, in 1852, is stated to be 4872*l.* 10*s.*

³ We thus speak of the law officers of the Corporation to denounce the system only—we have not the most distant idea of disparaging those who hold office under the Corporation. Indeed, the Judicial staff of the City of London we believe to enjoy and eminently deserve the public confidence and respect,

their predecessors of the eighteenth century say they, restrictions were placed on the admission to the freedom, — common law officers were remunerated by fees, judicial and administrative, were sold and possession and reversion; so also were profits of coal and corn meters, places, corporation became in a very embarrassing position. Corporation offices were held by aldermen, councillors, and bankers and bankrupts served the civic council. Heavy tavern expenses were incurred, and charity and education was neglected, and

In the nineteenth century, on the contrary, an entirely opposite course has been pursued. It has been made "to place the constituency and the corporation upon an extended and solid foundation." The franchise has been remitted, householders and tradesmen, freemen without the intervention of the lord, and common informers have been interdicted, and the fees and the sale of offices, &c., interdicted. The revenue has been lifted above its expenditure, and regulations have been made by the Corporation in bankruptcy, insolvency, and absence of a declared cause of forfeiture; the taverns have been standing committees restricted to 120000, given among indigent widows, and 90000, together with the sheriffs' and redemption to the freedom. In the nineteenth century that 20,00000. has been expended by the Corporation on the City school, and 500000. in the erection of the credit of the Corporation has been raised. Property was, in the last century, justly, in the nineteenth century important trusts have been created by the Corporation, and, above all things, public provision for the Guildhall proceedings.

All this, as far as it goes, is, no doubt, a great improvement on the proceedings of the times when, to the defence of this defence, "officers of every grade, from the State, the Church, and the Crown in

their patronage, and to dispose of places in their gift, as well in possession as in reversion." Is it, however, the fact that the present members of the Corporation of London have aided or retarded the progress of reform? Have they, whilst joining in the suppression of abuses which had become wholly intolerable, assisted in making available for the legitimate purpose, those free municipal institutions which have been fostered for so many ages?

Whilst the boundaries of other municipal cities and towns have spread with the increase of the places with which they are identified, the municipal boundaries of the City of London still terminate at Temple Bar and Aldgate: whilst the population of the Town of London has increased to two millions of inhabitants, the civic municipality remains monopolised by a locality with less than 128,000 inhabitants, and an area of about 600 acres,—smaller than Edinburgh and not a third of Liverpool, Manchester, or Glasgow¹; smaller even than either of the seven Metropolitan Boroughs, which, on the pretext of there being already a London Municipal Corporation, have been hitherto prevented having municipal institutions; whilst the expenditure of the City of London, with this comparatively small population, in the salaries of officers alone, amounts to upwards of 38,000*£*, Glasgow expends for the same object little more than 1000*£*. a year, Edinburgh less than 1800*£*, Manchester less than 6000*£*, Liverpool less than 10,000*£*. Whilst the whole civil expenditure of Edinburgh in support, not only of its municipal officers, the management of its property and finances, and the criminal department, but also in support of the ecclesiastical establishment and its admirable system of public education, is less than 20,000*£*. a year, the expense of Guildhall, independent entirely of the cost of police, of sewers, of education, and religion, is proved to amount, without any "*moral turpitude* or personal corruption" on the part of the members of the present City Corporation, to 107,874*£*.

We do not ourselves charge the members of the present Corporation of London either with "*moral turpitude* or personal corruption;" we have every reason to believe that

¹ The population of the City of London is 127,869; Edinburgh, 160,302; Liverpool, 376,065; Manchester, 316,213; Glasgow, 329,097.

there are to be found amongst the Corporation gentlemen not only of respectability and a sound sense and liberal views; but to whom the Common Council is composed and influenced by a very small section, who are all effectual reforms. If not turpitude in all events, a gross neglect of duty, and a want of form, when they allow the present state of the City. If they have the extensive power of interfering, which has been so much relied upon in resisting the measures of Parliament, why has not this power been used in all events, to check some of the evils that have arisen? If, on the other hand, they have not the power, why has not Parliament been asked to lend financial aid to the ancient free institutions of London to enable them to do this great City? We have been told that when the last Commission came into the City, it was appointed by the Corporation, with two or three of the Ministers of the day, to be brought in by Lord John Russell. His Lordship's intimation that the Bill would not be passed by this self-reforming Corporation remains, it is, that it has long been the practice of the Corporation, on St. Thomas' Day², for propositions of reform to the Common Council paper. We have seen the result of these efforts at self-reform in the City defence. The Corporation, as we have seen, are much in the habit of applying for aid in the management of their property, &c. In the last five years have the Sheriffs of the City presented petitions at the bar of the House for a City Bill, a private Bill was brought in, and passed under this designation, but it, after a mere immaterial alteration of the City Bill.

Again, in 1852, was a City Reform Bill, which was also a mere Election Bill, though

¹ Evidence of Mr. W. Williams, M.P., § 2830.

² St. Thomas's Day is the day on which the Corporation elect the electors.

³ 12 & 13 Vict. c. 94., an Act to amend the 11 & 12

character, and being chiefly supported by the evidence of the partisans of the Corporation, who represented it as a model of perfection, the Bill was thrown out, and reform is now unpopular at Guildhall.

A reform, however, and a sweeping one too, is inevitable. If municipal institutions are of any value at all, they can no longer be confined to a portion only of the Metropolis. London, any more than Liverpool, cannot remain without a system of local government. The innumerable local statutes, charters, customs, and bye-laws which govern it,—the hundreds of local boards and commissioners, and local and petty officers that its inhabitants are called on to maintain,—the numerous district courts, and district governments to which it is handed over,—must all give way to the progress of system: economy, efficiency, and simplicity, must take the place of extravagant expenditure, conflicting jurisdiction, and endless confusion. Whether one great and efficient corporation is to arise out of the ashes of the old civic institutions, or a separate municipality is to be formed for each of the metropolitan boroughs, it is quite clear that system must be pursued,—that there must be one body of police acting in unison for the whole Metropolis, one system of sewerage, and, let us add, one system of justice.

Aldermen or not, we cannot have gentlemen undertaking the responsible duties of police magistrates of the Metropolis whose chief knowledge of law has been derived from their acting as jurymen, and whose chief pretensions for the appointment are, that they already hold more offices than they can possibly attend to. We cannot have justice administered by deputy. The value of dilettanti officials is now fully appreciated. At Guildhall, at the Mansion House, at the Old Bailey, or at Clerkenwell, justice administered by inefficient, though unpaid officials, is costly indeed.¹ We hope, indeed, to see none but qualified justices take

¹ Sir Peter Laurie has recently come forward as the public apologist of the *unpaid* Aldermen. He argues that their value is shown by the fact that there are more convictions at the Central Criminal Court on committals by Aldermen than by the Stipendiary Magistrates. The facts of the worthy Knight are fallacious, inasmuch as the majority of the committals by the Stipendiary Magistrates of London are not to the Central Criminal Court; but his inference is more fallacious, inasmuch as the most difficult questions that arise in Magistrates' Courts are with respect to summary convictions.

their place in the judgment-seat in any Court of the Metropolis, — Middlesex, Surrey, Tower Hill, or elsewhere. We are innovators enough to be willing to do so altogether. The applicant for justice, the plaintiff and the defendant, are as much entitled to have justice done in trifling as in important cases. Let the Court of the Metropolis be uniformly presided over by a Judge duly qualified to administer justice according to the law of England, and no difficulty will arise in meeting the public demand for more expedition and regularity in our criminal procedure; the dispensing with the Grand Jury Presentments, and all the other duties taken out of the ancient office of the *Clerk of the Assize*, would add a hope that, whilst this useful office is being effected, measures may be taken for securing the Court of the Metropolis, as a substitute for the numerous Courts held with so much inconvenience to the public, and the Court for criminal trials, and appeals from the decisions of the magistrates.¹

We could not quit this subject of Metropolitan Justice without adverting to the inconvenience of the present system of administering justice in the City of London, and the remedies which appear so easily to be at hand. We now take leave of the subject. The London Corporation Commissioners are already under an honourable burden imposed upon them by the payment of the charges against, and the defence of, the members of the Corporation of London, and the discharge of a small part of their vocation. The greater and more important labour remains behind, — to rid the City of London of the incubus of a conflict of jurisdictions, and a confusion of law and local government, and to secure a system, economy, and efficiency.

¹ There are in the Metropolis, besides the Courts-leet and the Court of the City of London, Courts of Quarter Sessions, held at the Old Bailey, at Newington, and at Tower Hill. The Criminal Court at present holds its sittings once a month, and two Assistant Judges, sittings were to be substituted for the whole of the criminal trials and appeals from magistrates, and the saving of expense. We observe that in his evidence expressed his approval of this suggestion.

SELECTION OF ADJUDGED POINTS

REPORTED SINCE 1ST NOVEMBER, 1853.

POINTS DETERMINED IN THE COURT OF CHANCERY.
[By O. D. Tudor, Esq., Barrister.]¹

COURTS.	REPORTERS.
House of Lords, English and Irish Cases - - - - -	3 House of Lords' Cases. (Clarke). Part 5. Vol. iv. part 1.
House of Lords, Scotch Cases - - - - -	1 Macq. House of Lords' Cases. Parts 2 & 3.
Lord Chancellor, and Court of Appeal in Chancery - - - - -	2 De Gex, Mac. & Gord. Part 5. Vol. iii. part 1.
Master of the Rolls (Sir J. Romilly) - - - - -	15 Beav. Parts 2 & 3.
V.C. Parker - - - - -	5 De Gex & S. Part 4.
V.C. Kindersley - - - - -	1 Drew. Part 5. Vol. ii. part 1.
V.C. Wood - - - - -	Kay, Parts 1 & 2.
V.C. Stuart ² - - - - -	

I. POINTS DETERMINED IN THE COURT OF CHANCERY.

1. Charitable Bequest — Cypres — Construction of Will. 2. Charities — Bequest to Corporation to pay specified Sums to, out of Rents — Increased Rents how to be disposed of. 3. Covenant not to carry on Trade within certain District — Construction of — Injunction. 4. Husband and Wife — Assignment of Wife's Leaseholds — Equity to a Settlement. 5. Judgment Creditor — Sale — Foreclosure. 6. Jurisdiction — Lord Chancellor interested in subject-matter of Suit — Enrolment of Decree of Vice Chancellor — Appeal to House of Lords. 7. Mortgagor and Mortgagee — Foreclosure — Judgment Creditors. 8. Mortgagor and Mortgagee — Power of Sale — Redemption — Costs. 9. Mortgagor and Mortgagee — Redemption — Omission to attend to receive Money

¹ We are indebted to Mr. Tudor for the selection of cases in the last two Numbers.

² None of the decisions of Vice-Chancellor Stuart have yet been published by the authorised reporters.

— Subsequent Interest. 10. Mortmain Act — Bequest to Church Building Society. 11. Mortmain Act — Inrolment of Grant of Rentcharge to Charity — Retainer of Rentcharge by Grantor during his Life — Invalidity of Grant. 12. Public Policy — Peerage — Estate — Condition. 13. Settlement — Jointure chargeable primarily upon Settlor's real Estate. 14. Tender. 15. Trustee acting as Solicitor — Costs. 16. Trust, breach of — Trust Funds employed in Trade — Compound Interest. 17. Trust Funds — Power to invest on real Securities — Loan to a Railway Company on Assignment of Undertaking, Tolls, &c., improper. 18. Usury — Promissory Notes — Real Security. 19. Vendor and Purchaser — Sale by Direction of the Court — Misrepresentation in Particulars — Discharge of Purchaser from Contract. 20. Voluntary Gift — Undue Influence — Post-obit Bond — Onus of Proof. 21. Voluntary Gift — Family Arrangement — Parent and Child — Undue Influence. 22. Will — Construction of — Conversion. 23. Will — Conversion — Money directed to be laid out in Land — Tenant for Life entitled to Income from Testator's Death. 24. Will established against the Heir-at-Law at the Suit of a Devisee of the legal Estate — Origin of the Jurisdiction. 25. Winding-up Acts — Official Manager — Payment of Costs by personally.

1. CLARK v. TAYLOR. 1 Drew. 642.

Charitable Bequest — Cy-pres — Construction of Will.

Very difficult questions often arise in determining whether a bequest is intended for charitable purposes *generally*, or whether it is simply intended for the benefit of a *particular private charity*. The distinction between the objects of a charitable bequest in such cases is of much importance, for it is well settled by the authorities that *where* there is a gift to a charity *generally*, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect, if that mode fails, the Court, nevertheless, will carry out the general purpose of charity. Where, on the other hand, the testator shows an intention, *not* of general charity, but to give to some *particular institution*; if it fails, because there is no such institution, the gift will also fail, and will not go to charity generally. In the case of *Clark v. Taylor* the testator gave as follows: "I give to the treasurer for the time being of the Female Orphan School, in Greenwich aforesaid, patronised by Mrs. Enderby, the sum of 50*l.* for the benefit of that charity." It appeared by the evidence that the school, which had been voluntarily kept up by Mrs. Enderby at her own expense, had been entirely discontinued. Held by Sir R. Kindersley, V. C., that as the testator did not appear to contemplate a charitable purpose generally, nor even generally the particular species of charity designated, but intended only a charitable gift to a particular institution which had ceased to exist, it could not be disposed of

by the Court *cy-pres* for charitable purposes generally, but must be considered to have failed, and consequently fall into the residue.

2. THE ATTORNEY GENERAL V. THE CORPORATION OF BEVERLEY. 15 Beav. 540.

Charities — Bequest to Corporation to pay specified Sums to out of Rents — Increased Rents, how to be disposed of.

A testator devised property, producing 47*l.* a year, to a corporation in "trust and confidence" to pay three sums of 20*l.*, 10*l.*, and 10*l.*, to three charitable objects, and so long as certain taxes continued, what the corporation could not *spare* out of the surplus of the rents, viz. 7*l.*, should be deducted out of the two sums of 10*l.* and 10*l.* The rental increased to 180*l.*, and the corporation had been in the habit of making fixed payments only amounting to 40*l.* and of retaining the surplus. *Held* by Sir John Romilly, M. R., that the corporation were entitled only to seven forty-sevenths of the increased rental, and they took it burthened with the obligation of keeping in repair the property. "The authorities," said his Honour, "establish this proposition; that where an estate is given with a direction that the donees shall make out of the rents certain specified payments, and there is no direction with respect to the surplus, the donees of that estate will take the beneficial interest in the whole estate, subject to the payment of those specified charges, but that where the testator specifies the limits of his bounty to the donees — as, for instance, where the donor says, 'you are to take out of the rents a specified sum for the performance of the duties which are imposed upon you; — then the donees take nothing but the amount of rents so specified. If the whole amount of the rents of the estates is exhausted and divided between donees and the different charitable objects, they participate in the increased rents which may arise in after years, in proportion to the amount of the rents originally given to them respectively.'"

3. TURNER V. EVANS. 2 De Gex, Mac. & Gord. 740.

Covenant not to carry on Trade within certain District — Construction of. — Injunction.

T. H. E., a wine merchant, on the sale of his stock-in-trade and business at Caernarvon, covenanted that he would not *set up or carry on* at that place, or in any other place within the counties of Caernarvon, Anglesey, or Merioneth, (through which he had

been in the habit of travelling for orders at business of a wine merchant and spirit merchant up his place of business at Caernarvon, and mess within the prescribed district, but he orders within it. *Held* by Lord Cranworth, of Kindersley, V. C., that the question, whether a breach of covenant, was too doubtful to an injunction without bringing an action. Bruce, however, was of opinion that a breach had been committed, and the Court of Queen's Bench was of the same opinion.

4. HILL v. EDMONDS. 5 De Ge

Husband and Wife—Assignment of Wife's Leasehold

A husband and wife assigned leasehold property. The husband was possessed in her right, to a mortgage of money then lent and interest, by a deed containing a proviso for redemption by the husband and wife, or the representatives of either. The husband was insolvent, and the mortgagee filed a claim against the assignee in insolvency, and the assignee refused. The married woman proved that her husband was in the employment, and that she and her child were dependent on an equity to a settlement out of the mortgage. On her behalf relying upon *Sturgis v. Hedderley* (1 Cr. 97., *Hanson v. Keating*, 4 Hare, 1., and *Wentworth v. Berton*, 1 De Gex & S. 644. It was held by Lord Parker, V. C., that the married woman had an equity to a settlement; but the proviso for redemption being a condition precedent to the mortgagee's obligation to give the sum advanced by the insolvent and his wife, the mortgagee ought to be given to the married woman or her husband's assignee. "The plaintiffs," said the judge, "are entitled to come here to give each of them an opportunity of doing so, and a right to redeem an opportunity of doing so, and a right to foreclose them. In the cases cited, the mortgagee has an equitable title against the wife, and the mortgagee has the terms to make some settlement upon her, and she comes, having the legal title, which passed to the mortgagee. Now, it would be a very anomalous result if the husband could assign the legal title in these leasehold mortgages, so as to destroy the wife's equity, and

should not be affected by the mortgage made by him of the legal estate. In a suit by the mortgagee against the husband and his wife, this Court will not give the wife any equity for a settlement in such a case as the present."

5. FOOTNER v. STURGIS. 5 De Gex & S. 736.

Judgment Creditor — Sale — Foreclosure.

A judgment creditor having registered his judgment under 1 & 2 Vict. c. 110., and been in possession thereof under an *elegit* upon his judgment, filed a claim for foreclosure or a sale. Held by Sir J. Parker, V. C., that the plaintiff was not entitled to a decree for foreclosure. That in the case of a charge, the remedy was an order for sale. An agreement for a mortgage gave a right to foreclosure, but a mere charge did not.

6. DIMES v. THE PROPRIETORS OF THE GRAND JUNCTION CANAL.
3 House of Lords' Cases, 759.

Jurisdiction — Lord Chancellor interested in subject-matter of Suit — Enrolment of Decree of Vice-Chancellor — Appeal to House of Lords.

A public company which was incorporated, filed a bill against a landowner, in a matter largely involving the interests of the company, and the cause coming on to be heard before one of the Vice-Chancellors, he granted the relief sought by the company. On appeal to the Lord Chancellor, who was largely interested as shareholder in the company (a fact unknown to the defendant), his Lordship affirmed the decision of the Vice-Chancellor. Held by the House of Lords, that the Lord Chancellor was disqualified, on the ground of interest, from sitting as judge in his own cause, and that his decree was therefore voidable, and ought to be reversed, but that the disqualification of the Lord Chancellor did not affect the Vice-Chancellor, whose decree might be the subject of appeal to the House. Held also, that although the act of enrolment of the decree of the Vice-Chancellor was performed by the Lord Chancellor, it was valid for the purpose of bringing the appeal before the House of Lords.

7. STEAD v. BANKS. 5 De Gex & S. 560.

Mortgagor and Mortgagee — Foreclosure — Judgment Creditors.

A foreclosure claim having been filed by a mortgagee against a mortgagor and subsequent mortgagees, on the request of the plain-

tiff a decree was made, by Sir J. Parker, V.C. foreclosure against the first and second mortgage decree against all the judgment creditors *if they formed one incumbrancer*, and against Honour said, "that the only inconvenience of such a decree would be in case more than one by judgment should go to the Rolls at the time to redeem, prepared to pay off the first mortgage the decree; but if that should happen, the Court of Chancery, set it right. Judgment creditors exactly in the position of parties who had no security of the property." The learned judges in this case, make the following observation of a decree in this shape was first made by Lord Eldon when he was Vice-Chancellor, in *Radcliffe v. The Bank of England*, 1850, fol. 1295. Previous to that decree, every mortgagee had three months to redeem. This has since been followed by other judges. See particularly an elaborate judgment of V. C., in *Long v. Storie* on the 18th of Feb. 1850. *Mr. Bedwell Regro.*"

8. PEERS v. CEELY. 15 Bea.

Mortgagor and Mortgagee — Power of Sale — Right of Redemption

A mortgagee with power to sell and retain the proceeds, and expenses, contracted to sell the estate upon completion, the purchaser resisted the completion on the ground that the mortgagee, being advised by counsel that the sale was untenable, filed a bill for specific performance, which was dismissed with costs. *Held* by Sir J. Romilly, that the mortgagee was entitled to redemption that he could not charge the costs of the sale. (*Peers v. Ceely* (3 Russ. 458.)) said his Honour, there it was proper to bring the action against the mortgagee, as the property was rendered unavailable by the insolvency of the mortgagee, who was not able to pay that which the plaintiff mortgagee was right in instituting the proceedings to make it available.

"I cannot hold that the mortgagor must pay the costs of the sale, which the Court has decided to have been proper, and which he did not sanction."

9. HUGHES v. WILLIAMS. 1 Kay, Appen. iv.

Mortgagor and Mortgagee — Redemption — Omission to attend to receive Money — Subsequent Interest.

In a redemption suit, the mortgagee, by *mistake*, omitted to attend at the time and place fixed by the Master for payment of the sum computed to be due to him for principal, interest, and costs, and the mortgagor also did not attend to make payment thereof. *Held* by Sir W. P. Wood, V. C., upon a motion with notice, that as the omission to attend had been by mistake, the defendant, the mortgagee, ought not to be obliged to wait another six months, but that a new time and place for the payment of the money ten days after the date of the order should be appointed, but that as the defendant did not attend at the time fixed, he was not entitled to subsequent interest.

10. THE INCORPORATED SOCIETY FOR PROMOTING THE ENLARGEMENT, BUILDING AND REPAIRING OF CHURCHES AND CHAPELS v. BARLOW. 3 De Gex, Mac. & Gord. 120.

Mortmain Act — Bequest of pure Personality to Church Building Society.

The Incorporated Society for promoting the Enlargement, Building, and Repairing of Churches and Chapels, one of the objects of which is, by its Act of Incorporation, defined to be to grant funds towards enlarging or building churches and chapels, has no power to purchase land. *Held*, therefore, by the Lords Justices, that a bequest of pure personality to this Society is not within the Mortmain Act.

11. WAY v. EAST. 2 Drew. 44.

Mortmain Act, 9 Geo. 2. c. 36. — Enrolment of Grant of Rentcharge to Charity — Retainer of Rentcharge, &c. by Grantor during his Life — Invalidity of Grant.

T. G., by a deed of gift, granted to trustees a rentcharge for certain charitable purposes connected with a Baptist chapel. All the requisitions of the Mortmain Act, 9 Geo. 2. c. 36., were apparently complied with. The gift was made by deed indented, sealed, and delivered in the presence of two credible witnesses, more than twelve calendar months before the death of the grantor; and it was duly enrolled in Chancery within six months after its execution. The gift was, *by the terms of the instrument, made to take effect in possession* for the charitable uses intended, immediately

on the making thereof; and the deed contained cation, reservation, trust condition, limitation (whatsoever for the benefit of the grantor, or an claiming under him. The grantor lived mar and kept the deed, and its terms were never en evidence to show the intention of the grant trustees, that the deed *was not to take effect til death*, though there was no evidence of any *Held* by Sir R. T. Kindersley, V. C., that as ment or understanding or design among the that payment of the annuity was not to be life of the grantor, the grant ought to be decl no hesitation," said his Honour, "in declari if such an agreement or understanding existe when the deed was executed, or if such wa grantor in executing the deed, and that de in and acted upon by all parties, it is *not ne sign should be expressed on the face of the d* the case within the Statute of Mortmain; b regard the transaction as a *fraud on the St* void. But the onus of proving such an agree ing or design rests, of course, on the plaintiff

12. EGERTON V. BROWNLOW. 4 House

Public Policy — Peerage — Estate —

John William Earl of Bridgewater devised to trustees in trust to convey them to the great nephew, for ninety-nine years if he s remainder to trustees to preserve contingent to the use of the heirs male of the body dvers remainders over. Provided that, if die not having acquired the title of Duke water, *the estate directed to be limited to the should cease*, and the estates should there enjoyed according to the subsequent uses a by his will. Lord Alford died, leaving a s acquired the title. *Held*, by the House of decision of Lord Cranworth, V. C., that the favour of Lord Alford's heirs male was n viso, which was a condition subsequent, s being *against public policy*; and that the

Lord Alford was entitled to the estates as heir male under the limitation.¹

13. LOOSEMORE v. KNAPMAN. 1 Kay, 123.

Settlement—Jointure chargeable primarily upon Settlor's real Estate.

By a settlement made on his marriage, a husband secured an annuity, by way of jointure, to his wife, in the event of her surviving him, by a demise of real estate to trustees for a long term of years, and then covenanted that his heirs, executors, administrators, or assigns, should pay the jointure. *Held*, by Sir W.P. Wood, V.C., that the estate comprised in the term, and not the general personal estate of the testator, was the primary fund for payment of the annuity. "Lord Hardwicke," said his Honour, "in *Lanoy v. The Duke of Athol* (2 Atk. 44.), the leading case on the subject, says in effect, that although where there is a covenant for payment the personal assets are first charged, this is not extended to provisions in a settlement; and the ground must be that which is pointed out in the argument in *Lechmere v. Charlton* (15 Ves. 193.), that, in a security of this description, there is *not any benefit accruing to the personal estate* of the party who is the debtor; but the whole arrangement is merely for the purpose of securing a *jointure or portion*, and the personalty not having received any benefit, the true intent is, that the *real* and not the personal estate should be the *primary fund*."

14. EXPARTE JOHN DANKES, IN THE MATTER OF JOHN FARLEY.
2 De Gex, Mac. & Gord. 936.

Tender.

A trader who, under a trade debtor summons, had signed an admission of a debt, went to his creditor with the amount of it in his pocket, in money, and told the creditor that he had come for the purpose of paying that amount. The creditor said it was of no use, as it was too late, and that the debtor must see the creditor's attorney. *Held* by the Lords Justices that the production of the money was dispensed with, and that there was a good tender.

¹ For an elaborate examination of this important decision the learned reader is referred to 19 Law Review, 1.

15. LYON V. BAKER. 5 De Ge:

Trustee acting as Solicitor —

There is no rule better established or upon by Courts of Equity than this, — “*neither directly or indirectly derive any profit from his trust.*” The above case is a good illustration of the rule. An administration suit was brought against B., his co-trustee, a solicitor, and some of whom were infants. B. conducted the suit as partner. *Held* by Sir J. Parker, V. C., that B. was to pay the costs out of pocket, and declined to direct that the costs should be paid by the trust. B., having employed his partner in the suit to his advantage of all parties to the suit. “*I must decline to make it the established rule (whether it be a good rule or not) (the question), that a solicitor trustee, acting in the trust, can be allowed costs out of pocket.*” A similar question has been made in the case of two or more trustees, one of them, being a solicitor, acts for himself in the suit; but, if ordinary costs were allowed, the solicitor acts in a suit for himself alone, and, in effect, acts for himself alone by his partner. I must decline to make the rule altogether. I must decline to make it in this case would be a precedent which would have to make it in every case.”

16. JONES V. FOXALL. 15 L.

Trust, Breach of — Trust Funds employed in Trade

A trustee from the year 1834 to 1850 had drawn a trust fund from a trading firm of which he was partner. *Held* by Sir J. Romilly, M.R., that he was to pay compound interest at 5 per cent., and with giving judgment, made the following inquiry: “*The rules which apply to the cases of trustees charged with interest on the balances retained by them to a good deal of difficulty, arising, not so much from the principles themselves, as from the application of them to particular cases. Generally, if an executor has retained balances in his hands which he has not yet invested, the Court will charge him with interest at 4 per cent. on these balances; if, in addition,*

has committed a direct breach of trust, or if the fund had been taken by him from a proper state of investment, in which it was producing 5 per cent., he will be charged with interest after the rate of 5 per cent. per annum. If, in addition to this, he has employed the money so obtained by him in trade or speculation, for his own benefit and advantage, he will be charged either with the profits actually so obtained by him from the use of the money, or with interest at 5 per cent. per annum, and also with yearly rests, —that is, with compound interest.

“The principle on which the Court charges the executor with the profits which have actually arisen from the property of his *cestuis que trust* employed by him, is obvious, and of general application where such profits are proved to have been made. It was the money of the *cestuis que trust*, and they are entitled to receive the profits it has earned. The principle upon which executors charged with interest on balances are made to account with yearly or half-yearly rests, is not so clearly defined, nor are the decided cases by any means free from obscurity or contradiction. In some cases, the Court has charged the trustee with annual rests, because the trust, under which he acted, in distinct terms required him to accumulate the fund at compound interest. In other cases, the principle seems to have been, that the Court visits the executor or trustee with an account, in the nature of a penalty for his misconduct, where he has not merely committed a breach of trust, but where he has himself endeavoured to derive, or has actually obtained, some pecuniary advantage from the use of the money, of which he has thus obtained possession. In all these cases, however, a large discretion seems to have been exercised by the Court with regard to the facts and circumstances attending each particular case; and it is to the exercise of this discretion that the obscurity in discovering the principle, in some of the reported cases, is to be attributed; and it is only on this principle that the later cases, in which the rule has been drawn more stringently against the trustee, can be reconciled with some of the earlier authorities.”

17. MANT V. LEITH. 15 Beav. 524.

Trust Funds — Power to invest on real Securities — Loan to a Railway Company on Assignment of Undertaking, Tolls, &c. improper.

A settlement contained a power to invest trust money “on real securities.” A trustee lent it (with the consent of the tenant for life) to a railway company, on the usual assignment of the under-

taking, calls, rates, tolls, and all the estate &c the principal was not to be made payable for by Sir J. Romilly, M.R., that, assuming it it was not a proper investment for the trust the powers in the Act of Parliament, the security forced, in the ordinary way, by ejectment; no payment could not be demanded for seven years made available by a sale; and the parties happen to become entitled to receive the expiration of that time, and yet might be unable by a forced sale, and possibly at great disadvantage.

18. *EXPARTE WARRINGTON, IN THE MATTER OF*
RUPT. 3 De Gex, Mac. & G.

Usury — Promissory Notes — Real Estate

Advances were made to a person, after promissory notes, some having twelve, and some three, months to run, at a rate of interest which were further secured upon leasehold agreement. *Held* by the Lords Justices that the notes against the estate of the bankrupt owner of the notes having, by recent legislation, been rendered void by the Statute in Session of 12 Anne, c. 16. "The question was whether the Knight Bruce, "is one of proof merely, and whether it was or could have been contended that the notes sought to be proved were not provable without this objection was met by the statute 3 and the statute 2 & 3 Vict. c. 37., the respective necessity of maintaining that the securities for the payment of the bills or notes (secured upon 'lands, tenements, or hereditaments or interest therein,') had the effect of depriving them of statutory protection, which, accordingly, led to the controversy. The petitioner, however, claimed one of these securities. Asserting no more than that he desires to prove his alleged debt in full, and that the securities, therefore, are not wholly bad, or partly good and partly bad. The question is of the validity or invalidity of the bills or notes merely; and I am of opinion that not one of them is, invalidated

curities, whether to be treated or viewed as wholly contemporaneous, or in any other manner. I am convinced that the bankrupt, at the time of his bankruptcy, had no defence legally or equitably available against an action upon the bills or notes. The concluding proviso of the first section of the latter statute may invalidate mortgages, charges, and liens under certain circumstances, but, in my opinion, does not defeat or impeach the validity of any bill or note described in the body of the section, taken as these bills or notes appear to me to have been taken, *bonâ fide*, not colourably, nor by way of shift or evasion; though interest, at howsoever higher a rate than 5 per cent. per annum, was formally and expressly, as well as substantially, contracted for, and a landed security by writing, or deposit, or both, for the payment of the bill or note was contemporaneously (whether effectually or ineffectually) given." (See *Lane v. Horlock*, 19 Law Rev. 198.)

19. LACHLAN V. REYNOLDS. 1 Kay, 52.

Vendor and Purchaser — Sale by Direction of the Court — Misrepresentation in Particulars — Discharge of Purchaser from Contract.

It is a well established principle, that in dealings between vendor and purchaser there should be perfectly good faith on the part of the vendor in the representations which he makes to the purchaser. In *Lachlan v. Reynolds* it has been decided that the principle extends with equal stringency where a sale is made under the direction of the Court. In that case, a sale was directed by the Court, and the particulars of sale stated that Lot 12 comprised a house "at present in the occupation of C. at a rental of per annum 42*l*." The purchaser of this lot paid his deposit, and his purchase was confirmed by order absolute; and he then obtained an order for payment of the remainder of the purchase money into Court. The purchaser afterwards discovered that C. was not tenant to the vendors, but to some person who claimed by an adverse title. Held by Sir W. P. Wood, V.C., that the description in the particulars of sale must mean that C. was tenant to the vendors for a limited period at a given rent; and that this was a representation so different to the fact, that it amounted to such bad faith on the part of the vendors, as would induce the Court to discharge the purchaser from his contract.

20. COOKE V. LAMOTTE. 15 Beav. 234.

Voluntary Gift — Undue Influence — Post-obit Bond — Onus of Proof.

In this case Sir J. Romilly, M. R., set aside a voluntary bond by

a lady conditioned to be void on payment to her three nephews (already provided for by her will) of 15,000*l.* within six calendar months after her decease, or on her giving them, by her will, a legacy to that amount, upon the ground that it was not proved that she knew that the effect of the bond was to make her will irrevocable. "The rule," said his Honour, "in cases of this description is this, — where those relations exist, by means of which a person is able to exercise a dominion over another, the Court will annul a transaction, under which a person possessing that power takes a benefit, unless he can show that the transaction was a righteous one. It is very difficult to lay down with precision what is meant by the expression 'relation in which dominion may be exercised by one person over another.' That relation exists in the cases of parent, of guardian, of solicitor, of spiritual adviser, and of medical attendant, and may be said to apply to every case in which two persons are so situated, that one may obtain considerable influence over the other. The rule of the Court, however, is not confined to such cases. Lord Cottenham considered that it extended to every case in which a person obtains, by donation, a benefit from another to the prejudice of that other person, and to his own advantage; and that it is essential, in every such case, if the transaction should be afterwards questioned, that he should prove that the donor voluntarily and deliberately performed the act, knowing its nature and effect. It is not possible to draw the rule tighter, or to make it more stringent; and I believe it extends to every such case. (*See Billage v. Southee*, 9 Hare, 534.)

"The fact of such a relation existing between the parties is only a circumstance in the case, which may, according to its bearing on the other facts, be favourable or unfavourable to the person seeking to sustain the gift; but the existence of such a relation is not necessary to enable this Court to apply the rule before referred to; and that rule may, I believe, be thus expressed, — that in every transaction in which a person obtains, by voluntary donation, a benefit from another, it is necessary that he should be able to establish that the person giving him that benefit did so voluntarily and deliberately, knowing what he was doing; and if this be not done, the transaction cannot stand. It may be said, that this view is inconsistent with some of the observations in Lord Brougham's celebrated judgment in *Hunter v. Atkins*, 3 Myl. & K. 113., which I have very carefully read with reference to this subject. I cannot say that there may not be passages in that case which are not quite consistent with the view I am now stating;

but if that be so, it appears to me, that those passages are equally inconsistent with a long series of authorities in this Court. Undoubtedly, no person can read that judgment without being struck with the ability displayed in it. It was a very peculiar case; and admitting its authority, in that particular case, and under those circumstances, I think that if the doctrine there stated were carried to the extent which is here contended for, it might sap the foundation of one of the most valuable principles of equity, and prevent this Court from exercising a jurisdiction, by which it has not only established a rule of equitable jurisprudence, but has, at the same time, enforced a principle of high morality." See *Eape v. Lake*, 19 Law Rev. 191.

21. HOGHTON V. HOGHTON. 15 Beav. 278.

Voluntary Gift—Family Arrangement—Parent and Child—Undue Influence.

In the above-mentioned case, Sir J. Romilly, M.R., after referring to *Cooke v. Lamotte*, *antè*, p. 213., entered into an elaborate examination of the principles upon which the Court proceeds in dealing with two classes of cases which often afford contradictory analogies, viz., the first, where, as between strangers, benefits are obtained by undue influence, the second, where arrangements have been entered into for the peace of families and the security of family property. "The rule," observed his Honour, "to be drawn from these cases, which is perfectly consistent with the rule which prevails in the first class of cases to which I have referred, may, I think, be thus stated: that if the settlement of the property be one in which the father acquires no benefit not already possessed by him; and if the settlement be a reasonable and proper one, the Court will support it, even though it may appear that some influence was exerted by him to induce the son to execute it; and provided that there was no suppression of what is true or suggestion of what is false. This is distinctly stated by Lord Eldon in *Gordon v. Gordon* (3 Swanst. 400. 463.) as applied to family agreements, and will also apply to these cases of resettlement. When, however, the son *confers on the parent some advantages* which he did not previously possess, then the principle which prevails in the first class of cases interposes, and then this Court, to use the words of Lord Langdale in *Archer v. Hudson*, 7 Beav. 560., does not interfere to prevent an act of bounty between parent and child, but it will take care that such child is placed in such a position as will enable him to form an entirely

free and unfettered judgment, independent of control."

22. TAYLOR v. TAYLOR. 3 De Gex, M

Will — Construction of — Conversion. Phillips v. overruled.

It has long since been established as a governing case of *Ackroyd v. Smithson*, 1 Bro. v. Legard, 3 P. Wms. 22. n., that if a testator, realty and personalty, as a mixed fund, his will cannot take effect, the heir-at-law was the produce of the real estate, upon the heir-at-law cannot be disinherited without the rule was departed from by Sir John Leach in *v. Phillips*, 1 My. & K. 649., which has since been overruled, and has at length been expressly overruled by Lord Cranworth in the above-mentioned case of *Phillips v. Taylor*. The facts of which are briefly as follows:—The testator bequeathed his real estate to trustees upon trust to sell, and as to the proceeds, directed that they should sit in part of the residue of his personal estate. The residue was then bequeathed to the same trustees upon trust for his sons in equal proportions—one of the sons died in the infancy of the testator. The case was held by Lord Chancellor Cranworth, deceased son in the produce of the real estate, and as undisposed of by the will of the heir-at-law of the testator. His Lordship observed that he was unable to distinguish *Phillips v. Taylor* from the case under appeal, observed, "The argument from the testator's declaration that the proceeds should be deemed to be part of his personal estate has no weight; the decision in *Collins v. Wake* is a clear authority against it; it is only in the case of *Phillips v. Taylor* that the disposition of the personal estate is to be taken as the disposition of the proceeds of the real estate. It is a strange construction to hold, that because the testator disinherited his heir in favour of some person, the heir is to be defeated for the benefit of the testator has no design to favour. If, then, *Phillips v. Taylor* had come before me on appeal, I should have felt bound to overrule it, as decided by Sir J. Leach, I should have felt

it; and if such would have been my duty then, what course ought I to take now? . . . The law gives the estate to the heir, notwithstanding the direction of the testator, unless the testator makes a valid devise of it otherwise. Of course, I do not mean to say that a testator might not so dispose of the proceeds of real estate as to make it go to the next of kin; for example, he might, after directing the sale of his real estate, and forming a mixed fund, and making certain dispositions of it, declare that if for any reason any part of the disposition could not take effect, no portion of the proceeds arising from the sale of the real estate should go to his heir-at-law, but should go to such persons as would have been entitled if the estate had been sold by him in his lifetime. In that case, the next of kin would take, because there would be an express gift to them by the testator, but not as an interpretation of words of direction such as we have here."

23. *MACPHERSON V. MACPHERSON.* 1 Macq. H. of L. Cas.
243.

Will—Conversion—Money directed to be laid out in Land—Tenant for Life entitled to Income from Testator's Death.

A Scotchman, domiciled in England, by his will made in England, directed that the whole of his personal property should be laid out in the purchase of lands in Scotland to be entailed on a certain series of heirs. *Held* by the House of Lords (reversing the judgment of the Court below and overruling *Stott v. Hollingworth*, 3 Madd. 161.), that the first taker was entitled to the income from the testator's death, and that the rule which allows executors to defer the payment of legacies for twelve months did not apply. The Lord Chancellor (St. Leonard's), in his speech before the House, after an elaborate examination of the cases upon this subject, viz. *Sitwell v. Barnard*, 6 Ves. 520.; *Stott v. Hollingworth*, 3 Madd. 161.; *Angerstein v. Martin*, Turn. & Russ. 232.; *Hewitt v. Morris*, Ib. 241.; *La Terriere v. Bulmer*, 2 Sim. 18.; and *Douglas v. Congreve*, 1 Keen, 410.; and observing that he apprehended their Lordships might be safely advised that *Stott v. Hollingworth* was not law, added, "Lord Langdale, in the case of *Douglas v. Congreve*, made a remark, which applies to this case before your Lordships. 'In a case where there is no direction to accumulate, and, therefore, no direction to add interest to capital, it appears to me more likely to have been the intention of the testator that, until the lapse of such convenient

time as may be allowed to the executor to make the conversion directed by the will, the tenant for life should enjoy the interest actually accrued.' That is clearly a dictum in favour of the rule which I am recommending to your Lordships. Lord Lyndhurst in *Dimes v. Scott*, 4 Russ. 195., came to the same conclusion. I admit that this was at the end of an argument on another point, and therefore I do not give to his Lordship's opinion all the weight to which his decisions are so justly entitled; but he must have considered this to be the rule, and he acted on it. In the case of *Taylor v. Clark*, 1 Hare, 161., before Vice-Chancellor Wigram, his Honour went into a considerable comment on the cases, and, although a little embarrassed, he admitted the rule. Therefore, my Lords, I have no difficulty upon the authorities, as I think this point is now settled. But the difficulty which has arisen in the later cases is of a different nature; it is not whether the tenant for life is to be entitled from the death of the testator or not, but in what manner is he to have the benefit of that rule, *as between himself and the person entitled in remainder*. In a case like this before your Lordships, where the funds were invested in three per cent. consols, *he would clearly take the interest without making any call on the capital*, according to the rules of equity; but where, as in the case of *Angerstein v. Martin*, the fund stood in Russian stock, bearing a very large interest affecting the capital, a difficulty might arise. Lord Eldon gave the tenant for life even that large rate of interest. Judges have since supposed that his attention was not drawn to the point; and I incline to think so; for although you give the first year's income to the tenant for life, you must so do this as not to injure those in remainder. But I apprehend there will be no difficulty in dealing with those cases when they arise."

24. *BOYSE v. ROSSBOROUGH*. 1 Kay, 71.

Will established against the Heir-at-Law at the Suit of a Devisee of the Legal Estate — Origin of the Jurisdiction.

In this case it was held on demurrer by Sir W. P. Wood, V.C., that a bill can be maintained by a devisee of the legal estate in real property, who is in possession, for the purpose of establishing the will against the testator's heir-at-law, although the heir has brought no action of ejectment against the devisee. After an elaborate examination of the authorities, his Honour observed: "Having looked at the case under all these different views, having

carefully considered what equity arises against the heir authorising this very strict and peremptory decree, which forbids his ever disputing the question again, from the circumstance of there being a devise in trust instead of an ordinary devise of the legal estate, I am unable to find a ground for any such special equity on that account. If I had found a current of authority upon that question, I must have followed it, although I should not have been able to discover the principle on which the particular relief had been so granted. But when I find, on the one hand, Lord Manners saying I will assist a person by way of issue to establish a will when there is only the difficulty of an outstanding legal estate, and the only proper remedy would be an ejectment after that difficulty had been removed; and when I find, on the other hand, the Vice Chancellor Knight Bruce and the Vice Chancellor Parker concurring in sanctioning such a decree on a bill which did not ask to carry any trusts into execution, but simply to establish the will against the heir, it seems to me impossible to say that the equity arises from the circumstance of there being a devise in trust. It is true that I have been unable to discover any case in which the party, who has actually instituted a proceeding of this kind, has been a mere devisee of the legal estate; and that, on the other hand, there have been several such cases of bills for perpetuating testimony; but this may be explained for reasons which I have already stated. I say, taking all these circumstances into consideration, it appears to me that the equity must arise entirely from the fact of the devise, and the jurisdiction assumed by this Court in cases of devise over the heir, although he has brought no action, and has done nothing which brings him within the ordinary jurisdiction of bills of peace, to enable the devisee to have his title once for all quieted in the special case of a devise."

25. THE OFFICIAL MANAGER OF THE GRAND TRUNK, &c., RAILWAY COMPANY V. BRODIE. 3 De Gex, Mac. & Gord. 146.

Winding-up Acts — Official Manager — Payment of Costs by personally.

An order was made by Wood, V.C., that "W. Turquand, official manager of the said Company," do pay costs. *Held* by the Lords Justices, first, that as there were no negative words in the Winding-up Acts excluding the jurisdiction of the Court, it had power to visit the official manager with costs *personally*, if the Court

thought that there was a proper case for so doing ; secondly, that according to the fair import of the order, the costs in the first instance, at all events, were to be so paid by the official manager.

II. POINTS DETERMINED IN THE COURTS OF COMMON LAW.

(By ALEXANDER PULLING, Esq., Barrister-at-Law.)

COURTS.	REPORTERS.
Queen's Bench	14 Queen's Bench, Part 4. 16 Queen's Bench, Part 4. 1 Ellis and B., Parts 3 & 4. 2 Ellis & B., Parts 1 & 2.
Common Pleas	11 Common Bench, Part 5. 12 Common Bench, Parts 1 & 2.
Exchequer	8 Exchequer, Part 5. 9 Exchequer, Part 1.
22 Law Journal, N. 8. Common Law.	

1. Action of Account — Tenants in Common — Apportionment of Rent — Form of Pleadings — Reasonable Account. 2. Attorney and Solicitors — Striking off the Rolls — Suspension from Practising — Bill of Costs under 6 & 7 Vict. c. 73. s. 37., stating Name of the Court. 3. Authority to pay Money — When revocable. 4. Bankruptcy — Assignment of Chose in Action before Bankruptcy of Assignee — Action in Bankrupt's own Name as Trustee after his Bankruptcy — What is a Fraudulent Transfer — Act of Bankruptcy. 5. Charter — Construction of — Evidence of Usage. 6. Contract for exclusive Personal Service — Statute of Labourers — Action for procuring a Breach of Contract. 7. Contract, Mercantile — Construction — Sale of Cargo not in existence — Condition Precedent — Implied Warranty of Title. 8. Copyright — What is a Publication. 9. Costs — Small Debts Act — Plea of Tender. 10. Felon — Convict — Assignment of Property before Conviction. 11. Fences — Damage to Cattle through defect of — Action when maintainable — Railway Company — When liable. 12. Insurance — Condition Precedent. 13. Judgment of Colonial Court, how impeached. 14. Justice of the Peace — Action when maintainable under 11 & 12 Vict. c. 44. s. 2. — Mandamus to hear Information. 15. Landlord and Tenant — Quiet Enjoyment — What Agreement implied from Parol Demise. 16. Libel — Evidence of Publication — What a sufficient Plea of Justification. 17. Municipal Corporation Act — Payment of Officers' Salaries — Construction of s. 92. 18. Parent and Child — When Parent liable for Child's Debts. 19. Pleading — Accord and Satisfaction — Want of Consideration — Readiness and Willingness. 20.

Practice — Habeas Corpus ad subjiciendum — Attesting Witness — Admission of Deed by Party called as a Witness. 21. Right of Way — How affected by Non-use for Twenty Years. 22. Scire facias to repeal a Charter, when issuable. 23. Shipping — Liability of Shipowners for Goods consumed by Fire. 24. Trust Funds — Remedy to compel Application of.

1. BEER V. BEER. 12 C.B. 60.

Action of Account — Tenants in Common — Apportionment of Rent — Form of Pleadings — Reasonable Account.

Thomas Beer and the defendant, tenants in common fee, made a lease with a general covenant on the part of the lessee to pay the rent without saying to whom, on Michaelmas and Lady Day. Thomas Beer died, and on the following Lady Day the tenant paid half a year's rent to the defendant. The plaintiff, the heir-at-law of Thomas Beer, received 12s. 6d. from the defendant, but he claimed 6l. 5s., the amount of half a year's rent, and this was an action of account, to make the defendant account for that sum.

Held by the Court of Common Pleas that the defendant was accountable to the plaintiff for what he had received above his share of the rent, that the Statute of Apportionment (4 W. IV. c. 42.) does not apply as between the executor and heir of a tenant in fee: — that, as the demise purported to be a joint demise, by tenants in common with a general reddendum, not specifying to whom the rent was payable, the rent followed the reversion, and on the death of A, the reversion was split, and the plaintiff became entitled to his share of the rent.

It was held also that the declaration, which was in the usual form, was good, without any allegation that, after a request to account, a reasonable time had elapsed before the action was brought.

This case is worth perusing, as it affords some practical information on the nature of the action of account, and lays down the law of apportionment under the 2 W. IV. c. 22., and the right to recover rent by the heir of a tenant in common on a joint demise, with a general reddendum. The subject of the revival of the old form of action of account as a concurrent remedy, with that by Bill in Chancery for an account, has undergone some discussion of late years. See "Law Review," vol. ix. p. 178. Mr. Justice Maule observed in the present case, "that the effect of the statute of Anne was to place the defendant in the ordinary situation of an accountant, the allegation of a request and refusal or neglect to account being sufficient to charge him." With re-

gard to the statute 4 W. IV. c. 22., Mr. Justice Maule observed, "apportionment cannot take place between the executor and the heir of a tenant in fee. It could not have been made at the Common Law, and it appears to me the general scope and object of the statute did not interfere with the operation of the Common Law." This view of the law accords with that of *Browne v. Amyot*, 3 Hare 173. s. c. With regard to the last point, Mr. Justice Maule observes, "the cases cited for the proposition show that where an indenture or other instrument does in its terms necessarily import jointure, the covenantor binds himself to the covenantees jointly, and in the event of death, the joint nature of the covenant does not disable the survivor from suing alone, and, in some cases, persons may choose to have joint covenants, although they have several interests. *Wetherall v. Langston*."

But those are quite beside the cases where covenants have been held joint or several, to the interest of the covenantees or the context of the indenture, and to be construed according to the intention of the parties, as it is to be collected from the nature of their interests. To apply those principles to the present case, the instrument purports to be a joint demise, and the lessors demise a joint property, but the right of the rent arises out of the *reddendum*, which is general "yielding and-paying" so much. The persons to whom the rent is to be paid being studiously left unnamed, it is to be paid by those who are by law the proper persons. In other words, the *reddendum* gives the rent to him who is entitled to the reversion.

This is a right of action arising out of the nature of the party's interest in the land, and is distinguishable from the cases where the rent is payable by personal covenants to particular persons.

2. IN RE SMITH. 1 E. & B. 414.—*COOK v. GILLARD*. 1 E. & B. 26.

Attorney and Solicitor — Striking off the Rolls — Suspension from Practising — Bill of Costs under 6 & 7 Vict. c. 73. s. 37., stating Name of the Court.

Mr. Smith had acted as a Master Extraordinary of the High Court of Chancery without having been duly appointed to the office. The Lord Chancellor had, upon notice of the fact, ordered Mr. Smith's name to be struck off the roll of that Court. A rule had been obtained in the Court of Queen's Bench for the same purpose, founded upon the Lord Chancellor's order, but was enlarged to give Mr. Smith time for explanation. The Lord Chancellor, upon Mr. Smith's explanation, reversed his former order, and ordered

Mr. Smith to be restored to the roll, after six months' suspension from practice, on payment of costs. The Court of Queen's Bench, upon notice of this last order, discharged the rule against Mr. Smith, on his payment of the costs.

Cook against Gillard has, in some degree, settled the practice with regard to the form of Attornies' bills delivered pursuant to the Statute 6 & 7 Vict. c. 73. The plaintiff's bill of costs, delivered before the action, pursuant to the Statute, contained items applicable to proceedings in the superior Courts of Law, but did not contain any statement from which it could be inferred in what particular Court the business was transacted. The Court of Queen's Bench *held* such a Bill to be a compliance with the Act, unless the party charged thereby prove that any further information was practically required for the purpose of taxation, or shows that the name of the Court in which the business was done, would have been of use to him. Thus overruling *Lewis v. Primrose*, 6 Q. B. 265.; *Martindale v. Falkner*, 2 C. B. 706.; *Engleheart v. Moore*, 15 M. & W. 548.; *Ivimey v. Marks*, 16 M. & W. 843.; *Dimes v. Wright*, 8 C. B. 831., and confirming *Cozens v. Graham*, 21 L. J. C. P. 206. The rule, as laid down in *Lewis v. Primrose*, &c., applied to the existing statute, the Court said, originated in a mistake, being first introduced by applying the Act of 2 Geo. II., which gave the jurisdiction to tax to the Court in which the greater part of the business was done. Under the present Statute, each of the superior Common Law Courts have a concurrent jurisdiction to tax attornies' bills and the other scale of charges is now uniform; and as the Statute does not expressly require the name of the Court to be given, there is no necessity for it to appear.

3. YATES AND OTHERS, ASSIGNEES OF SAMUEL SEAL, A BANKRUPT,
v. HOPPE. 9 C. B. 541.

Authority to pay Money— When revocable.

Seal, who had drawn an accommodation bill on the defendant a few days before its maturity, handed over money to the defendant to meet the bill. A fiat having been issued against Seal between the deposit and the day of maturity and payment of the bill;

Held by the Court of Common Pleas, that the money having been handed over to the defendant in pursuance of a binding contract upon a good consideration, viz., an implied contract of indemnity, the bankruptcy of Seal was no revocation of the defendant's authority to apply the money in satisfaction of the

Bill, and, consequently, that Seal's assignees could not recover it back in an action for money had and received to their use. (See Lord Abinger's Judgment in *Walker v. Rostron*, 9 M. & W. 911.)

4. *BODDINGTON v. CASTELLI*. 16 Q. B. 879. — *GRAHAM v. CHAPMAN*. 12 C. B. 85.

Bankruptcy — Assignment of chose in Action before Bankruptcy of Assignor — Action in Bankrupt's own Name as Trustee after his Bankruptcy — What is a Fraudulent Transfer — Act of Bankruptcy.

Boddington v. Castelli was an action of assumpsit to recover a partial loss on a valued policy of insurance on goods on a voyage from Havannah to a market in Europe at 60 per cent., to return 23s. 9d. if landed in the United Kingdom. The plaintiff sold the goods whilst at sea, and transferred the policy and right to recover for the loss, but the contract of insurance had before bankruptcy been duly assigned, together with the goods insured, to Messrs. Fudge, on whose behalf the plaintiff sued as trustee. The risk ended in the United Kingdom before bankruptcy, and it was held by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, on the construction of the pleadings which set up these facts, that the causes of action being both vested in the plaintiff before bankruptcy, and being such that distinct actions might have been brought by him whilst *sui-juris*, the plaintiff was entitled to sue in his own name as trustee for that cause of action in which he had no beneficial interest at the time of his bankruptcy. The majority of the Judges holding that it would have been otherwise had the plaintiff then had any beneficial interest, however small, in the cause of action itself.

In *Graham v. Chapman* the facts were these:—Larke, the bankrupt, being indebted to Chapman for goods, assigned over to him his whole stock in trade as security for the money then due, and a further sum of 200*l.* advanced by way of loan. The deed of assignment contained, besides the usual covenants, a power of entry if the debt and interest should not be paid on or before the 1st of June 1850. The debt and interest not having been paid, the defendant took possession; and the Court of Common Pleas held, that such an assignment was an act of Bankruptcy and a fraudulent transfer within the 12 & 13 Vict. c. 106. s. 67. (See on this subject the cases of *Siebert v. Spooner*, 1 M. & W. 714.; *Lindon v. Sharpe*, 6 Man. & Gr. 895., and *Whitwell v. Thompson*, 1 Esp. 68.)

5. BRADLEY V. PILOTS OF NEWCASTLE-UPON-TYNE. 2 Ell. & B.
427. Part 2.

Charter — Construction of — Evidence of Usage.

In this case a charter of 3 Jac. II. granted to the Corporation of the Master, Pilots, and Seamen of Newcastle-upon-Tyne a certain duty, called primage, (described in the charter as an ancient duty) upon goods brought by ship into the Tyne or any of the creeks of Newcastle, of which Sunderland was one, to be rated as follows, viz.: aliens and strangers born, and all other persons arriving with ships in Newcastle within any of the creeks, and not belonging to the same, to pay before they departed with their ships; and every free merchant and inhabitant of Newcastle arriving in the Tyne with a ship, within ten days after landing the goods. The charter also granted all other rights &c. previously enjoyed by the corporation, and provided that the sum granted by it should be in lieu of all other duties formerly received. It was *held* by the Exchequer Chamber (affirming the judgment of the Court of Queen's Bench), 1. that the charter was consistent with the claim of primage in respect of goods imported into Sunderland by merchants residing there; and 2. that evidence of usage was admissible in support of the claim.

6. LUMLEY V. GYE. 2 Ell. & Bl. 216.

Action for procuring Breach of Contract — Seduction of Servant — Statute of Labourers.

In this case, a contract was made between the plaintiff and Miss Johanna Wagner, for her to perform as his dramatic artiste at his theatre, in operas, for a specified time on certain terms; and among others, that she should not, during the time, sing or use her talents elsewhere than in his theatre, without his written authority. The plaintiff alleged in his declaration, that the defendant, during the time the contract was in force, enticed and procured the said Johanna Wagner to refuse to perform as aforesaid, and to depart from the said employment; special damage being alleged. This declaration was demurred to, and the questions raised upon this demurrer were, 1st. whether the said Johanna Wagner was a servant within the meaning of the Statute of Labourers; and 2ndly, whether an action was maintainable against the defendant for enticing her away, as such servant, from the plaintiff's service.

The majority of the Judges of the Court of Queen's Bench, *held* upon this demurrer, upon the authority of *Blake v. Lanyon*, 6 T. R. 221.; *Adams v. Baffeld*, 1 Leon, 246.; *Pilkington v. Scott*, 15 M. & W. 657.; *Hartley v. Cummings*, 5 C. B. 247.; *Sykes v. Dixon*, 9 Ad. & Ell. 693.; *Winsmore v. Greenbank*, Willes, 577.; *Green v. Button*, 2 C. M. & R. 707.; *Hart v. Aldridge*, Cowper 54.¹; that the action was maintainable: 2ndly, that Miss Wagner was within the meaning of the Statute of Labourers; and 3rdly, that the action would lie at Common Law. Mr. Justice Coleridge, however, who dissented from the rest of the Court, *held*, that the action for procuring a third party to depart from his engagement is founded on the Statute of Labourers, and is strictly confined to cases where the employer and employed stand in such relation of master and servant as to come within that statute; and that in all other cases the remedy for a breach of contract is only on the contract, and against those privy to it; and that as a dramatic performer is not a servant, therefore the counts were all bad.

This important case well deserves a very attentive perusal; we have not space here to enter into any lengthened comments upon it, but the whole law will be found most elaborately discussed in the reported judgments of the Judges.

7. COUTURIER AND OTHERS V. HASTIE AND OTHERS. 8 Exch. 40.
—HASTIE AND OTHERS V. COUTURIER AND OTHERS. Weekly
Reporter, No. 32.—STAUNTON V. WOOD. 16 Q. B. 638.—CHAP-
MAN V. SPELLER. 14 Q. B. 621.

*Mercantile Contract — Construction — Sale of Cargo not in Existence — Con-
dition Precedent — Implied Warranty of Title.*

Messrs. Couturier, merchants at Smyrna, chartered a vessel to proceed to Salonica, and there, having loaded a cargo of Indian corn, to proceed to a safe port in the United Kingdom. They accordingly shipped, at Salonica, 1180 quarters of Indian corn, and on the 22nd of February, 1848, the master signed a bill of lading making the corn deliverable "to order of Messrs. Couturier or to their assigns, he or they paying freight, as per charter party."

Messrs. Couturier endorsed the bill of lading and sent it, together with the charter-party, to Bernouilli, their London agent, with orders to sell the cargo on their account; and they also, through Bernouilli, insured the cargo, "at and from Salonica to the port of discharge in the United Kingdom, &c." "Corn warranted free from average, unless general, or the ship be stranded."

¹ See also Com. Dig. action on the case (A.); Id. ib. action on the case for misfeasance (A. 6.).

On the first of May, 1848, Bernouilli employed Hastie and Co., corn-factors in London, to sell the cargo, and sent them the bill of lading endorsed, the charter-party, and the policy of insurance, and Hastie and Co. advanced 600*l.* on the cargo. The custom of corn-factors is to sell under a *del credere* commission, and when so selling not to mention the purchaser. On the 15th of May, 1848, Hastie and Co. sold the cargo to a Mr. Callendar, and sent him a bought note which stated that he had bought of them "1180 quarters of Salonica Indian corn of *fair average quality when shipped at 27*s.* per quarter, free on board, and including freight and insurance*, to a safe port in the United Kingdom, payable at two months from this date upon handing over shipping documents." On the same day defendants wrote to Bernouilli advising him of the sale, but without making any mention of the purchaser or of commission. The vessel sailed from Salonica on the 23rd of February, and having met with tempestuous weather the cargo became so heated and fermented that the vessel was obliged to put into Tunis Bay, where the cargo having been surveyed was found to be unfit to be carried further, and on the 24th of April it was sold. On the 23rd of May, Callendar gave Hastie and Co. notice that he repudiated the contract, on the ground that the cargo did not exist at the time of the sale to him. In March 1849 Callendar became bankrupt. The present action was brought against Hastie and others to recover the price of the cargo, and the declaration was framed on a *del credere* guarantee. *Held*, by the Court of Exchequer, 1st, that the true meaning of the contract (which could not be explained by an evident mercantile usage) was, that the purchaser bought the cargo if it existed at the date of the contract, but, that if it had been damaged or lost he bought the benefit of the insurance; and, therefore, he was bound to pay the stipulated price in a reasonable time after the bill of lading and other shipping documents were handed over to him. Pollock, C. B. dissentiente. Secondly, that Hastie and Co. were responsible by reason of their *del credere* commission, although there was no guarantee in writing signed by them, since this was not an undertaking to pay the debt of another within the fourth section of the Statute of Frauds.

Thirdly, that Couturier and Co. were entitled to judgment *non obstante veredicto*, on a plea which stated that, at the time Hastie and Co. were employed to sell the corn, it was heated and fermented, and had been unloaded and sold; that Hastie and Co., and Callendar were ignorant of the premises; and that Callendar in a reasonable time after the sale, and before the time of payment, repudiated the contract.

Held by the Exchequer Chamber (reversing the judgment of the Court of Exchequer, and affirming the opinion of Pollock, C. B., and the ruling of Martin, B., at Nisi Prius), that the contract (which was unexplained by any evidence) was for the sale of a cargo, supposed to exist and to be capable of transfer, and that, inasmuch as it had been sold and delivered to others by the captain before the contract was made, the plaintiffs could not recover in this action. *Held*, also, that if the words "of a fair average quality when shipped" had not been introduced, the purchaser would have taken upon himself the chance of the condition of the cargo at the time of shipment; that these words enabled him to object if the cargo was bad when shipped, but did not operate to render him liable upon a contract made after the cargo had ceased to exist.

That the purchaser would have been liable if the cargo had existed in specie though in all but a worthless state.

That the basis of the contract was the sale and purchase of goods, on which all the other terms in the bought note were dependent, and that it would not have the effect of a contract for the sale of goods, "lost or not lost."

Staunton v. Wood was an action on an agreement by which the defendants agreed to buy of the plaintiffs cable bars at a certain price per ton, the said goods to be delivered forthwith to the defendants at the works, and the said price to be paid by the defendants in cash in fourteen days from the time of the making of the said contract. The Court of Queen's Bench *held*, that on the contract thus set forth, the delivery was meant to precede the payment, and that a readiness on plaintiff's part to deliver the goods was a condition precedent. (See on this subject *Simpson v. Henderson*, Moo. & Mal. 300; *Kemble v. Milla*, 1 M. & G. 757.)

Chapman v. Speller was an action of assumpsit by a purchaser against a vendor of goods on an alleged warranty that the latter had title to sell. Defendant, at a sheriff's sale, bought the goods from the sheriff for 18*l*.; plaintiff, who was also at the sale, bought defendant's bargain of him for 5*l*., and paid him 23*l*. Defendant paid the sheriff the 18*l*., and he began to deliver the goods to plaintiff; but they were then claimed as not being the property of the execution debtor, and were recovered by the true owner. The Court of Queen's Bench *held*, that there was no implied warranty by the plaintiff that he had title, nor any failure of consideration, the plaintiff having paid the 23*l*. to defendant, not for the goods, but for the right which defendant had acquired by his purchase, and that the consideration had not failed.

8. NOVELLO V. LUDLOW. 12 C. B. 177., 21 L. J. C. P. 169.

Copyright — What is a Publication.

This was a special case for the opinion of the Court of Common Pleas. In August, 1850, the defendant, as one of the Committee of Management of the Liverpool Philharmonic Society, caused copies of a musical composition, published by plaintiff, to be lithographed for the use of the performers at a concert given by the Society. They were not sold, or given to any one else, and the Court *held*, that the action was maintainable under 5 & 6 Vict. c. 45.

9. CROSSE V. SEAMAN. 11 Com. B. 524.

Costs — Small Debts' Act — Plea of Tender.

The plaintiff in this action sued in the Common Pleas for a sum exceeding 20*l.*; the defendant pleaded a tender as to part, and paid that sum into Court. The plaintiff recovered his full demand, which, exclusive of the sum paid into Court, was under 20*l.*, and the Court *held*, he was entitled to recover costs notwithstanding the Small Debts' Act.

10. WHITAKER V. WISEBEY. 12 C. B.

Felon — Convict — Assignment of Property before Conviction.

In this case the plaintiff's father and brother were convicted of Arson, at the Huntingdon summer assizes, 1851. The commission day was on the 19th of March, the trial took place on the 22nd, and the jury gave their verdict on the 24th. The prisoners had, on the 20th (the day after the commission day), executed in favour of the plaintiff, a deed of assignment of their goods, bearing date the 17th March (the defendant was the auctioneer by whom the goods were sold, the real claimants of the goods being the Corporation of Cambridge.)

The Court of Common Pleas *held*, on the authority of *Doe v. Hersey*, 3 *Wilson* 234., that the assignment was valid, and that the assignee could prove the actual day of the conviction, although the record mentioned only the commission day.

11. RICKETTS V. E. & W. I. DOCKS CO. 12 C. B. 160.

Fences, damage to Cattle through Defect of — Action when maintainable — Railway Company.

In this case the plaintiff was owner of a close adjoining another

close the property of a railway company. By a defect in his fences, his sheep came on to the adjoining close, and by a defect in the defendant's fences they strayed into defendant's railway, and were killed. The Court of Common Pleas *held*, upon the authority of *Pomfret v. Ricroft*, 1 Wms. Saund. 321.; *Rex v. Pease*, 4 B. & Ad. 30.; and *Dovaston v. Payne*, 2 H. Bl. 527., that the plaintiff could not recover either at Common Law or under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20. s. 68.), or on the ground that defendants exercised a dangerous trade, the obligation to make and maintain fences, both at Common Law and by the statute, applying only as against the owners or occupiers of the adjoining close.

12. *MASON v. HARVEY.* 8 Ex. 814.

Insurance — Condition Precedent.

The defendant's policy of insurance against fire contained several conditions, amongst which was the condition "that whenever a fire shall happen, the insured shall give immediate notice thereof to one of the secretaries or agents of the Society, and within three months deliver to such secretary or agent, under his or her hand, accounts exhibiting the full particulars, and amount of the loss," &c. The Court of Exchequer *held*, that the delivery of such particulars was a condition precedent to the right to recover on the policy.

13. *BANK OF AUSTRALASIA v. NIAS.* 16 Q. B. 717.

Judgment of Colonial Court — How Impeached.

The Bank of Australia was established in 1833, for the purpose of carrying on the business of bankers at Sydney, and by a special Act of the Legislative Council of New South Wales, the proprietors were enabled to sue and be sued in the name of the chairman; and it was provided that execution on any judgment against the Company might be issued against the property of any member for the time being, in like manner as if such judgment had been obtained against such member personally. The plaintiffs sued the chairman of this Bank, pursuant to the Special Act, in the Supreme Court of New South Wales, for a large sum of money due from the Bank, and obtained judgment.

The present action was brought on this judgment, and the declaration, after setting out the judgment, &c., and alleging the defendant to be a member of the Company, went on to state that

the same judgment remained unsatisfied; and the defendant, by means of the premises, became liable to pay the same. The defendant pleaded, amongst other things, that the debt for which the chairman was so sued was not the debt of the Company; that the defendant had no notice whatever of the proceedings with respect to the said judgment, nor had any *scire facias* issued to revive the same against him, and that the judgment was erroneous on the merits. On demurrers which arose out of these pleadings, the Court of Queen's Bench *held*: 1st, the provision of the Act in question, enabling the plaintiffs to sue the Bank of Australia in the name of the chairman, was consistent with the law of England, and a judgment recovered against such chairman was *prima facie* good, and could be enforced against the defendant as a member of the Company in the Courts of this country; and, 2ndly, that inasmuch as the objections now made to the judgment on the merits could have been taken in the Courts of New South Wales, and on an appeal to the Privy Council, they were no answer to the present action.

14. BESSEL V. WILSON. 1 E. & B. 489.—REGINA V. INGHAM.
14 Q. B. 396.

*Justice of Peace — Action when maintainable under 11 & 12 Vict. c. 44. s. 2.—
Mandamus to hear Information.*

The defendant in the first of these cases, an alderman and a justice of the City of London, convicted Bessel for an alleged offence under the Copyright of Designs Act, 6 & 7 Vict. c. 65., and adjudged him to pay a penalty, and he not having paid it, afterwards summoned him to show cause why he should not be committed in default of paying, and be further dealt with according to law. Bessel did not appear to the summons personally, but his counsel and attorney appeared. The alderman refused to hear the case in Bessel's absence, and issued a warrant for his apprehension, reciting the summons and Bessel's neglect to appear, and directing his apprehension to answer to the complaint, and be further dealt with according to law. Bessel, under this warrant, was apprehended and committed to prison. The conviction was afterwards quashed, and this action was brought for false imprisonment. The Court of Queen's Bench *held*, that Alderman Wilson was not protected by statute 11 & 12 Vict. c. 44. s. 2.; the summons to appear after the conviction not being the summons spoken of in that section, the non-appearance to which was to prevent the maintenance of an action.

2ndly, that even if the summons had been within the section, the appearance to it by counsel and attorney was sufficient, and the action was therefore maintainable.

Regina v. Ingham was an application for a *mandamus* against justices who refused to hear an information for perjury in certain legal proceedings which were still pending, and the Court of Queen's Bench refused to compel them. [*Vide Rex v. Ashburn*, 8 Car. & Payne, 50.; and *Reg. v. Bartlett*, 1 D. & L. 95.]

15. *BANDY V. CARTWRIGHT.* 8 Exch. 913.

Landlord and Tenant — Quiet Enjoyment — Agreement — What is implied from Parol Demise.

On the trial of this case, it appeared that in the year 1824, one Joseph Cartwright had granted a rent-charge of 2*l.* 2*s.* per annum upon certain premises to one Squires, and that subsequently the premises had been demised by parol to the plaintiff by defendant, who claimed, through a mortgagee of Cartwright; but the demise did not contain any mention of a covenant for quiet enjoyment or good title, although the declaration stated that it did. During the demised term Squires, the original grantee, distrained upon the plaintiff's goods for arrears of rent-charge. And it was *held* by the Court of Exchequer, on motion for a new trial, that under a parol demise the law would imply an agreement for quiet enjoyment, but not for good title; and granted a new trial on payment of costs by the plaintiff, to enable him to amend, by striking out of the declaration the allegation as to covenant for title.

16. *DUKE OF BRUNSWICK V. HARMER.* 14 Q. B. 185.—*HELSHAM V. BLACKWOOD.* 11 Com. B. 111.

Libel — Evidence of Publication — What a sufficient Plea of Justification.

These were actions of libel; and in the first of them the Statute of Limitations was pleaded. The Court of Queen's Bench *held*, that to negative this plea, proof of sale of a single copy to the plaintiff or his agent from defendant within the seven years was sufficient, and that the fact that the only publication proved was the sale to the agent was immaterial.

In *Helsham v. Blackwood*, the declaration set out a libel published in the defendant's magazine, imputing to the plaintiff, an officer in the army, that he had been guilty of murder in killing his opponent in a duel, and that *the duel was supposed to have been fought* under circumstances revolting to the ordinary notions of

honour. The plea set out, that the plaintiff had killed one Lieutenant Crowther, and was indicted, arraigned, and tried for murder; and went on to allege that the plaintiff's case *looked black enough at the trial, and that there were rumours of foul play*. The plaintiff having replied to this plea, that he was acquitted of the murder, it was *held* that the defendant was bound to justify the matter of aggravation of the charge; the Court intimating, however, that the replication setting up the acquittal by way of estoppel was bad.

17. ADDISON V. MAYOR, ETC. OF PRESTON. 12 C. B. 135—146.

Municipal Corporation Act — Payment of Officers' Salaries — Construction of Section 92.

This was a special case for the opinion of the Court of Common Pleas, under the 3 & 4 W. IV. c. 24. s. 45. The plaintiff brought his action against the Corporation to recover the amount of his salary due to him as Judge and Assessor of the Borough Court of Preston, duly appointed in compliance with the 5 & 6 W. IV. c. 76. s. 92., which provides "that after the election of the Treasurer in any borough, the rents and profits of all hereditaments, and the interest of all monies belonging to the Corporation, shall be paid to the Treasurer, and by him carried to the account of the 'Borough Fund,' which fund shall be applied towards payment of the salary of the Mayor, &c., and of the respective salaries of the Town Clerk and Treasurer, and of every other officer whom the Council shall appoint."

Held by the Court of Common Pleas, that an action of debt against the Corporation for arrears of salary was not maintainable by an officer appointed by the Council, but that the amount must be paid out of the "Borough Fund," in compliance with s. 92. of 5 & 6 W. IV. c. 76., above quoted.

18. SHELTON V. SPRINGETT. 11 C. B. 452.

Parent and Child — When Parent liable for Child's Debts.

The Court of Common Pleas *held*, in this case, that the mere moral obligation on a parent to maintain his child affords no legal inference of a promise to pay a debt contracted by him, even for necessities. (See *Mortimore v. Wright*, 6 M. & W. 482.)

19. FLOCKTON v. HALL. 14 Q. B. 380.—CROFTS v. BEALE. 11 C. B. 172.—ARMITAGE v. INSOLE. 14 Q. B. 728.

Pleading—Accord and Satisfaction—Want of Consideration—Readiness and Willingness.

To a declaration in case for infringing a patent, defendants pleaded in bar that after declaration it had been agreed between plaintiffs and defendants that defendants should admit their liability—that defendants should take, and plaintiffs grant, a licence for the use of the invention—that defendants should hand a cheque to a third person to be handed to plaintiffs upon grant of licence—that each party should pay their own costs in the action—that “this action, and the causes of action included in the same, should be settled, &c., by the arrangement, &c., as before mentioned.” Averments, that defendants admitted their liability, drew and delivered the cheque, and had always been ready to perform the agreement, take the licence, and pay their own costs,—of which plaintiffs had notice. *Held* bad on special demurrer.

For that if the agreement were construed as an accord in respect of the things to be done, there was no averment of satisfaction, the stipulations of defendants not having been all performed; and if the making of the agreement itself was relied upon, there was no allegation, expressed or implied, that the agreement was accepted in satisfaction.

Also, because the plea left it ambiguous, which of the two matters above specified was relied upon as the accord and satisfaction?

Crofts v. Beale was an action of assumpsit by payee against maker, on a promissory note, payable *on demand, with interest*. Defendant pleaded that the note was made as a collateral security for a debt due from a third party; that defendant was never at any time liable to pay the debt, or to give the note as a security, and denied any other consideration. *Held*, a sufficient plea of no consideration, after verdict.

In *Armitage v. Insole*, the action was for breach of a special agreement to give yearly, free, to plaintiff twenty tons of coals to be put free on board ship, for three years, at Cardiff; and the declaration omitted to aver that the plaintiff had either named a ship on which defendant was to deliver them, or was ready and willing so to do. The Court of Queen’s Bench *held* the declaration bad on general demurrer, Mr. Justice Coleridge observing, in giving judgment, “When a party has the duty cast on him of proving

any matter left uncertain in a contract, be it of time or place, and he means to insist upon the breach of such contract, he ought first to show that he has fixed the particular matter. Here the declaration is perfectly bare in that respect."

20. DIMES'S CASE. 14 Q. B. 554.—WHYMAN V. GATLE. 8 Exch. 803.

Practice — Habeas Corpus ad subjiciendum — Attesting Witness — Admission of Deed by Party called as Witness.

In Dimes's case a writ of Habeas Corpus *ad subjiciendum* being issued, a return was made of committal by order of the Vice-Chancellor of England, for breach of injunction ordered by the Lord Chancellor. The order was signed C. C., which, it was suggested, were the initials of "Cottenham Chancellor." On motion on behalf of prisoner, for time to file affidavits for the purpose of showing that Lord Cottenham had a personal interest in the cause, and therefore, as prisoner contended, his judgment was void, *held*, that the Court will not grant time to file affidavits for the purpose of dissolving matters not apparent on the return to a Habeas Corpus, unless the nature of the facts to be sworn to is suggested, and it appears such affidavits might be available.

And, in this case, liberty to file the proposed affidavits was refused, as the order of committal was that of the Vice-Chancellor, who had jurisdiction to decide whether there was proper ground for a committal, and this Court could not review such decision.

In Whyman v. Gatle, which was tried before Cresswell, J., at the Liverpool Spring Assizes, it was proposed to prove a deed by calling the defendant who had executed it. The question was then held to be improper, and the Court of Exchequer *held*, that a party in a cause who is a witness cannot prove the execution of a deed when there is an attesting witness who is capable of being called. (See King v. Harringworth, 4 M. & S. 350.)

21. WARD V. WARD. 7 Exch. 838.

Right of Way — How affected by Non-user for Twenty Years.

This was an action of trespass, to try the defendant's right of way over the plaintiff's land. The defendant was owner of a close called the "Stubbing-pits," to which the disputed right of way attached; but, in point of fact, there had been no user of this way from 1814 to the present time, the plaintiff, who had once held the "Stubbing-pits," having provided other lands of his own, which furnished a shorter and more convenient way to and from the

Stubbing-pits; for this new way the succeeding tenants of the Stubbing-pits had paid the plaintiff a small acknowledgment. *Held*, by the Court of Exchequer, that no presumption of abandonment could be made from the mere fact of non-user.

22. *REGINA V. EASTERN ARCHIPELAGO COMPANY.* 1 E. & B. 310.

Scire facias to repeal a Charter — When issuable.

This was a *scire facias* to repeal the charter granted to the defendants by the Crown. The charter directed (*inter alia*) that the Company should not begin business until it had been certified to the Board of Trade by at least three of the Directors, that at least one half of the capital had been subscribed for, and at least 50,000*l.* paid up. The charter contained a proviso that, in case the Corporation should not comply with any "the directions and conditions in our said letters patent contained," it should be lawful for the "Queen, by any writing, under the Great Seal, or under the Sign Manual," to revoke the charter, "either absolutely, or under such terms or conditions" as the Queen should think fit. The declaration in *scire facias*, which was at the relation of a private prosecutor, contained (amongst others) a suggestion that before the Company began business a certificate was given by the Directors that 50,000*l.* had been paid up, which was false in fact, to their knowledge, and this suggestion being traversed, the verdict was found for the Crown. On a rule to arrest the judgment, on the ground that the declaration did not show that the Queen had, "by writing, &c.," revoked the charter, *held*, by Campbell, L. C. J., and Wightman, J., that the express power reserved by the charter to revoke it wholly or in part, was in addition to, and consistent with, the implied right of the Crown to revoke it by *scire facias* on breach of a condition subsequent; that there was no distinction, in this respect, between a *scire facias* by a private prosecutor in the name of, and with the consent of, the Crown, and one at the instance of the Crown, and that the declaration in *scire facias* was sufficient. *Held*, by Coleridge, J., and Erle, J., that the express power to revoke superseded the implied power of revocation, and that it was necessary that there should be a revocation by writing under the Great Seal or Sign Manual, for this condition broken, before any *scire facias*.

23. *MOREWOOD V. POLLOK.* 16 Q. B. 743.

Shipping — Liability of Shipowners for Goods consumed by Fire.

Certain goods were delivered on account of the plaintiffs at

Mobile, and accepted by the defendants in order to be shipped on board their ship the *Barbara*, and carried to Liverpool. The goods were lost by a fire, occasioned by the negligence of persons on board a lighter, not belonging to the defendants which was carrying the goods to the ship.

The Court of Queen's Bench on demurrer to pleadings which set up these facts, and on the construction of the 26 Geo. III. c. 86. s. 2. (protecting shipowners against losses to goods shipped by means of fire on board the ship), gave judgment for the plaintiffs; in compliance with *Gale v. Laurie*, 5 B. & C. 156—163. and *Hunter v. McGowen*, 1 Bligh, 573., the defendants being, as the Court observed, liable at Common Law, and not protected by the terms of the statute, the lighter not being part of the ship, nor the property of the defendants.

24. EDWARDS V. LOWNDES. 1 E. & B. 81.

Trust Funds — Remedy to compel Application of for Salary.

In an action for salary, brought by the organist of the parish of Burslem, under s. 91. of the stat. 6 Geo. IV. c. 131., against the clerk of the Local Board of Health, the powers and duties of the trustees appointed under the said Act having vested in him by a provisional order of the General Board of Health; *held*, that the board and the organist stood in the relation of trustee and *cestui que* trust, and that in the absence of a specific appropriation of a part of the fund to the plaintiff, no action at law lay, the remedy being in equity, upon the authority of *Pardoe v. Price*, 16 M. & W. 451.

The two following important Law Commissions have been appointed by the Crown in addition to those mentioned in our last Number, p. 183. :

"Sir John Romilly, M.R., Sir John Jervis, C. J., Sir Edward Ryan, Mr. C. H. Cameron, Mr. McLeod, Mr. A. P. Hawkins, Mr. T. F. Ellis, and Mr. Lowe, 'to examine and consider the reform of the judicial establishments, judicial procedure, and laws of India.'"—Nov. 29. 1853.

"Mr. S. H. Walpole, Mr. Napier, the Attorney and Solicitor General, Mr. Headlam, Mr. Scully, Mr. Lowe, Mr. W. D. Lewis, Mr. Drummond, Mr. E. Denison, Mr. Robert Wilson, and Mr. W. S. Cookson, 'for considering the subject of Registration of Titles with reference to the sale and transfer of land.'"—Jan. 20. 1854.

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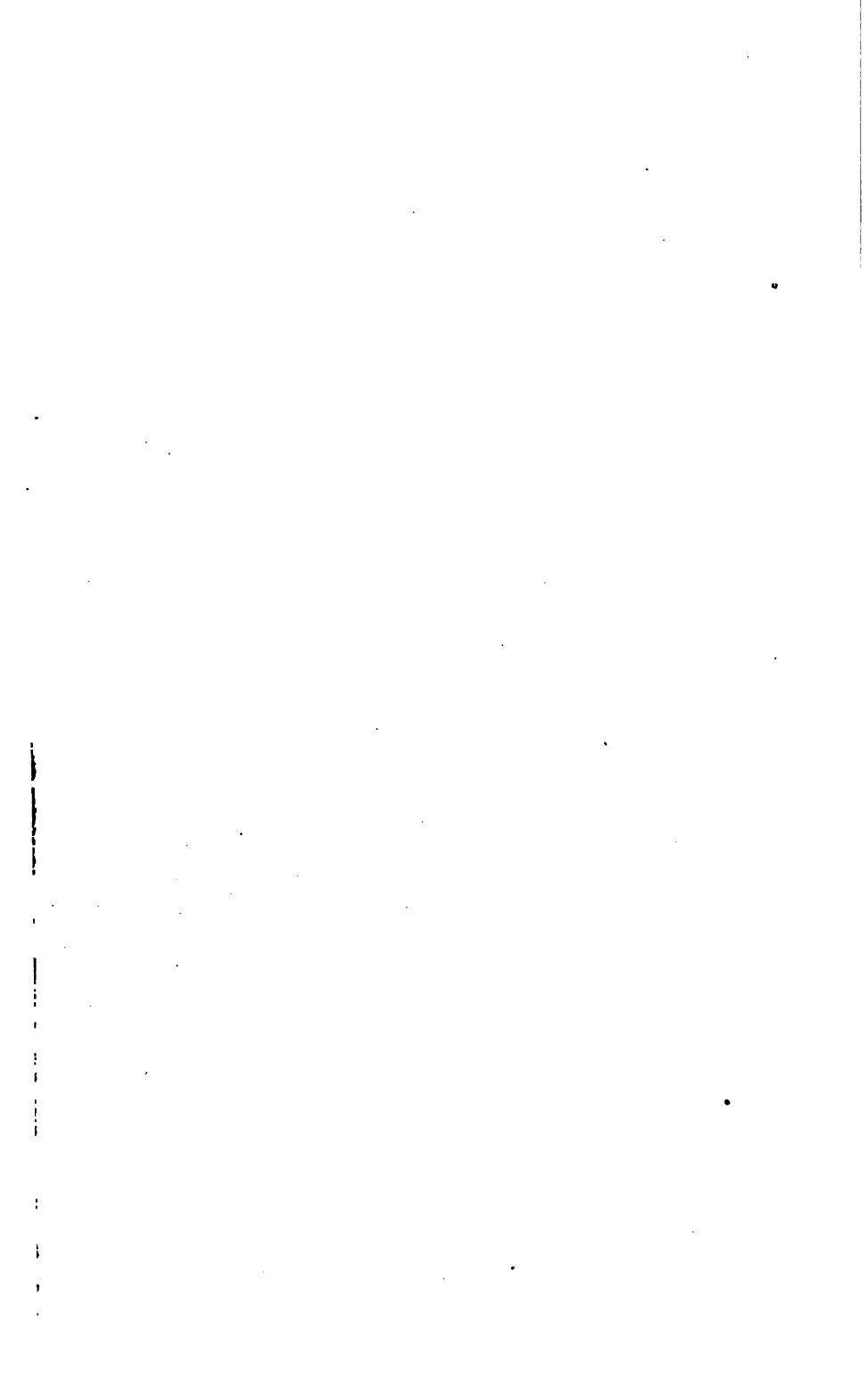
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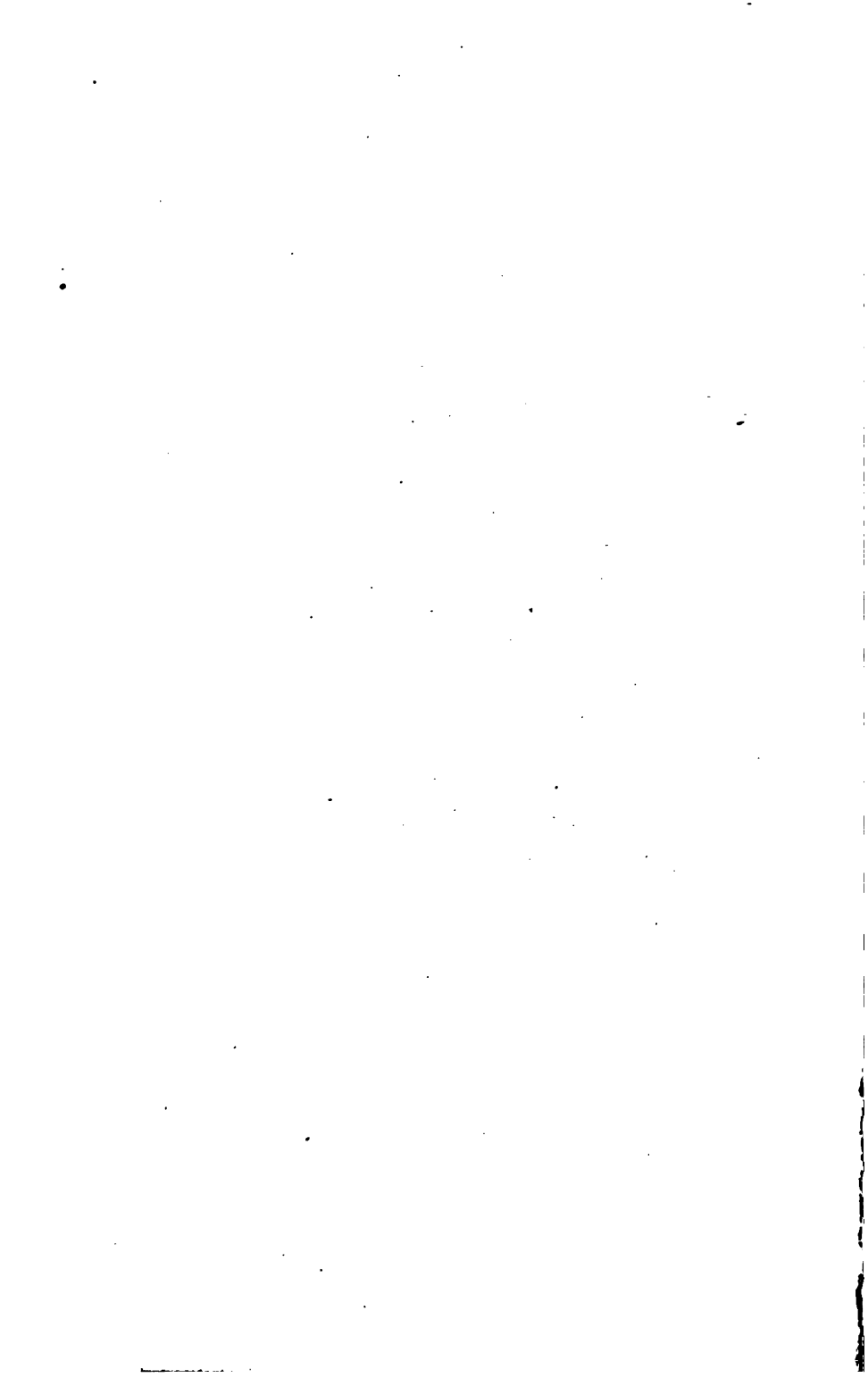
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honour. The plea set out, that the plaintiff had killed one Lieutenant Crowther, and was indicted, arraigned, and tried for murder; and went on to allege that the plaintiff's case *looked black enough at the trial, and that there were rumours of foul play*. The plaintiff having replied to this plea, that he was acquitted of the murder, it was *held* that the defendant was bound to justify the matter of aggravation of the charge; the Court intimating, however, that the replication setting up the acquittal by way of estoppel was bad.

17. ADDISON V. MAYOR, ETC. OF PRESTON. 12 C. B. 135—146.

Municipal Corporation Act — Payment of Officers' Salaries — Construction of Section 92.

This was a special case for the opinion of the Court of Common Pleas, under the 3 & 4 W. IV. c. 24. s. 45. The plaintiff brought his action against the Corporation to recover the amount of his salary due to him as Judge and Assessor of the Borough Court of Preston, duly appointed in compliance with the 5 & 6 W. IV. c. 76. s. 92., which provides "that after the election of the Treasurer in any borough, the rents and profits of all hereditaments, and the interest of all monies belonging to the Corporation, shall be paid to the Treasurer, and by him carried to the account of the 'Borough Fund,' which fund shall be applied towards payment of the salary of the Mayor, &c., and of the respective salaries of the Town Clerk and Treasurer, and of every other officer whom the Council shall appoint."

Held by the Court of Common Pleas, that an action of debt against the Corporation for arrears of salary was not maintainable by an officer appointed by the Council, but that the amount must be paid out of the "Borough Fund," in compliance with s. 92. of 5 & 6 W. IV. c. 76., above quoted.

18. SHELTON V. SPRINGETT. 11 C. B. 452.

Parent and Child — When Parent liable for Child's Debts.

The Court of Common Pleas *held*, in this case, that the mere moral obligation on a parent to maintain his child affords no legal inference of a promise to pay a debt contracted by him, even for necessities. (See *Mortimore v. Wright*, 6 M. & W. 482.)